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Bringing Christian Schools within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues

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Comments

BRINGING CHRISTIAN SCHOOLS WITHIN THE SCOPE OF THE UNEMPLOYMENT COMPENSATION LAWS: STATUTORY AND FREE EXERCISE ISSUES

I. INTRODUCTION

A major first amendment,[1] free exercise conflict has arisen between Christian schools,[2] which have traditionally enjoyed a minimum of governmental interference,[3] and the federal and state employment security agencies jointly responsible for the administration of the unemployment compensation laws.[4] Christian schools, rapidly expanding in size and number,[5] have recently been brought within the scope of the Federal Unemployment Tax Act (FUTA)[6] by an administrative determination of the United States Department of Labor.[7] The Labor Department found author-

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1. U.S. CONST. amend. I. The first amendment, which contains both the free exercise and establishment clauses, provides in pertinent part: "Congress shall make no law respecting the establishment of religion, *or prohibiting the free exercise thereof.*" *Id.* (emphasis added). The first amendment religion clauses have been held to apply to the states through the fourteenth amendment. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. For a discussion of the characteristics and philosophies of Christian schools, *see* notes 20-36 and accompanying text *infra*. Due to the nature of the Supreme Court's analysis in free exercise cases, the scope of this comment has necessarily been restricted to church schools of a single religious heritage. The Supreme Court, in evaluating free exercise claims of an aggrieved religious organization, has traditionally engaged in a *particularized* inquiry with respect to both the historical and philosophical characteristics of the organization in question and the potential effects of governmental action on that organization. *See generally* notes 259-68 & 281-88 and accompanying text *infra*. Because Christian schools have initiated most of the litigation dealing with the issue raised in this comment, the scope of this discussion has been restricted to Christian schools.

3. Aside from being required to comply with state statutes relating to school attendance, length of school year, and health and safety regulations, nonpublic schools in general were not regulated by the states until the middle of the twentieth century. *See generally* E. BOLMEIER, THE SCHOOL IN THE LEGAL STRUCTURE 115-18 (1973); D. ERICKSON, PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 103-34 (1969). In fact, private schools were not required by most states to be approved or accredited until this century. *See* State v. Whisner, 47 Ohio St. 2d 181, 197-98, 351 N.E.2d 750, 767 (1976). Within the past few years, governmental agencies have attempted to impose upon religious schools the requirements of 1) making unemployment compensation contributions, *see* notes 120-34 and accompanying text *infra*; 2) complying with the National Labor Relations Act, *see* NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979); and 3) pursuing a nondiscriminatory policy as to students, *see* note 12 *infra*.

4. For a discussion of the structure of the unemployment compensation system, *see* notes 57-67 & 163-74 and accompanying text *infra*.

5. For a discussion of the recent growth of Christian schools, *see* notes 20-24 and accompanying text *infra*.

6. I.R.C. §§ 3301-3311. For the amendment to FUTA which, according to the Department of Labor, brings Christian schools within FUTA's scope, *see* note 112 and accompanying text *infra*.

7. For a discussion of the Labor Department's construction of the pertinent unemployment compensation laws, *see* notes 120-34 and accompanying text *infra*.

ity for its action in the 1976 amendments to FUTA,[8] which eliminated the unemployment compensation tax exemption for primary and secondary schools.[9]

While most recent United States Supreme Court cases dealing with the first amendment religion clauses[10] have focused on whether state aid to religious schools violates the establishment clause,[11] the issue raised by the application of unemployment compensation laws to Christian schools, which is presently being litigated in the federal and state courts, involves a *free exercise* challenge to governmental agency intervention in the practices and policies of church-related schools.[12] Despite the strong governmental interests involved in extending unemployment compensation coverage to employees of nonpublic schools,[13] there are substantial indications that subjecting Christian schools to unemployment taxation is neither statutorily mandated[14] nor constitutionally permissible.[15]

This comment will review the goals, background, and nature both of the Christian schools and of the unemployment compensation statutes. Relying upon the recent Supreme Court decision of *NLRB v. Catholic Bishop of Chicago*,[16] and a close interpretation of the relevant FUTA provisions, it will

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8. *See* Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667.

9. *See* notes 108-12 and accompanying text *infra*.

10. For the relevant provisions of the first amendment, *see* note 1 *supra*.

11. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

12. In addition to the unemployment compensation issue addressed by this comment, three other free exercise issues involving government agencies and religious schools are currently garnering attention. First, many Christian schools have refused to comply with state approval and accreditation requirements, resulting in the states attempting to close the schools and prosecute parents for causing their children to be truant. *See* Hinton v. Kentucky St. Bd. of Educ., No. 88314 (Franklin Cir. Ct., filed Oct. 4, 1978); North Carolina v. Columbus Christian Acad., No. 78 CVS 1678 (Super. Ct. Div., Wake County, N.C. Sept. 1, 1978); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). Second, a recently proposed I.R.S. revenue proceeding provides for a mechanism whereby religious and other private schools which fail to maintain specified nondiscriminatory policies will lose their tax exempt status. *See* 44 Fed. Reg. 9451-9455 (1979); 43 Fed. Reg. 37,296-37,298 (1978). Congress has subsequently denied funding for this proposed mechanism for the current fiscal year. Treasury, Postal Service, and General Government Appropriation Act of 1980, Pub. L. No. 96-74, tit. VI, § 615, 93 Stat. 559, 577 (1979).

The third area of conflict between religious schools and a governmental agency has been recently resolved by the United States Supreme Court in NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979). The Court held that the National Labor Relations Board lacked authority to order parochial schools to engage in collective bargaining with lay teachers' unions. *Id.* at 1322. For a discussion of the parochial school labor cases, *see* notes 297-308 and accompanying text *infra*.

13. For a discussion of the governmental interests involved in unemployment compensation, *see* notes 50-56 and accompanying text *infra*.

14. Regarding the lack of statutory grounds for subjecting Christian schools to unemployment compensation taxation, *see* notes 174-252 and accompanying text *infra*.

15. For a discussion of the constitutionality of the application of the unemployment compensation statutes to Christian schools, *see* notes 310-69 and accompanying text *infra*.

16. 99 S. Ct. 1313 (1979).

be suggested that the Labor Department's determination to bring Christian schools within the scope of FUTA is not consistent with the statute or Congressional intent.[17] Finally, this comment will suggest that in light of the three-tiered analysis of free exercise rights developed by the Supreme Court in *Wisconsin v. Yoder*,[18] treating Christian schools as "employers" for purposes of the unemployment compensation laws violates the first amendment to the United States Constitution.[19]

II. BACKGROUND

A. *The Christian School Phenomenon*

The startling growth of Christian schools in the past decade has attracted nationwide attention.[20] It is estimated that there are presently 20,000 Protestant-related schools in the United States,[21] of which about 1,500 were formed in September, 1978.[22] New Christian schools are being formed at the approximate rate of two per day.[23] In the past decade, pupil enrollment in certain regional associations of Christian schools has increased over 700%.[24]

Due to the independent nature[25] of most Christian schools, no one description is capable of encompassing them all. Some are owned and operated by churches, while others are independently incorporated.[26] However, two valid generalizations may be made about these schools: 1) they subscribe to a

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17. *See* notes 175-252 and accompanying text *infra*.

18. 406 U.S. 205 (1972). For a discussion of *Yoder's* three-tiered inquiry *see* notes 261-91 and accompanying text *infra*.

19. *See* notes 254-369 and accompanying text *infra*.

20. *See* THE NAT'L OBSERVER, Jan. 15, 1977, at 1; U.S. NEWS AND WORLD REP., Aug. 18, 1975, at 50; U.S. NEWS AND WORLD REP., Oct. 8, 1975, at 44; The Philadelphia Bulletin, Jan. 8, 1979, at 1, col. 8. ABC news commentator, Paul Harvey, has stated:

> Christian schools predate public schools in the United States by 200 years. These are not "parochial" schools. They are supported in whole or in part by a church, but each is open to anybody who is academically qualified and willing to live and work by the rules.
>
> Christian schools are the fastest growing education movement in America.

P. KIENEL, AMERICA NEEDS BIBLE CENTERED FAMILIES AND SCHOOLS 96 (1971).

21. The Philadelphia Bulletin, Jan. 8, 1979, at 1, col. 8.

22. *Id.*

23. THE NAT'L OBSERVER, Jan. 15, 1977, at 1.

24. *Id.*

25. *See id.*

26. There are a substantial minority of separately incorporated Christian schools not owned or operated by a single church or association of churches. Such schools are often incorporated by parents, operated by a Board of Trustees, and owned by a nonprofit society of contributing parents and friends of the school. Many such schools are incorporated pursuant to a charter containing a statement of specific doctrines mutually convenanted to by all parents, teachers, administrators, and society members. This doctrinal statement may or may not be patterned after that of an established denomination; consequently, a Christian school may be comprised of individuals attending many different local churches while sharing common fundamental doctrines.

Church operated and separately incorporated schools do not necessarily differ substantially in their beliefs, practices, or curriculum. In fact, the individuals involved in separately incorpo-

strict, literal interpretation of the Bible and integrate its teachings into all areas of education;[27] and 2) they hold as a fundamental doctrine the necessity of personal faith in Christ's death and resurrection as the means of salvation.[28]

The primary reason most Christian schools exist, according to many observers, is to apply Scriptural principles in the classroom in a fashion which is now impermissible in the public schools.[29] Some analysts, however, have asserted that the primary reason for the expansion of Christian schools is the desire to create racially segregated "enclaves" of education.[30] While there are undoubtedly some nominally religious schools operated primarily to provide racially segregated education under a religious cover,[31] many Christian schools have voluntarily achieved substantial racial integration.[32]

The dramatic increase in the size and number of Christian schools has been paralleled by a growing tendency on the part of governmental agencies to subject Christian schools to regulation,[33] taxation,[34] and investigation.[35] This increased governmental intervention has generated cases in state and federal courts litigating the competing interests of the government and the schools.[36]

B. *An Overview of Unemployment Compensation Legislation*

The impetus for the passage of unemployment compensation legislation was provided by the unprecedented levels of unemployment which existed

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rated Christian schools often display many characteristics of a church, in that they meet regularly to engage in worship, Christian education, prayer, and fellowship. The primary difference between church schools and separately incorporated schools is the structure of their organizations. Unlike church-related schools, the administration of a separately incorporated school is not under the direct authority of any local church; separately incorporated schools are not conducted on church property and are not funded by a church. *See generally* DELAWARE COUNTY CHRISTIAN SCHOOL, HANDBOOK FOR BOARD MEMBERS 3-32 (Aug. 1979) (unpublished pamphlet on file at the VILLANOVA LAW REVIEW office).

27. *See* The Philadelphia Bulletin, Jan. 8, 1979, at 1, col. 8.

28. *See id.*

29. *See* THE NAT'L OBSERVER, Jan. 15, 1977, at 1, 18. For a presentation of the philosophical background and method of operation of Christian schools, *see* P. KIENEL, THE PHILOSOPHY OF CHRISTIAN SCHOOL EDUCATION (1978).

30. *See* Rowan, *Schools That Give Religion a "Bad Name,"* The Philadelphia Bulletin, Jan. 9, 1979, at 7, col. 1.

31. *Id.*

32. *See* U.S. NEWS AND WORLD REP., Oct. 8, 1973, at 45; The Philadelphia Bulletin, Jan. 8, 1979, at 3, col. 1.

33. *See* notes 3 & 12 *supra*. For a discussion of the aspects of the unemployment compensation laws considered by Christian schools to be particularly burdensome, *see* notes 72-107 and accompanying text *infra*.

34. *See* notes 3 & 12 *supra*. Regarding the tax elements of the unemployment compensation laws, *see* notes 72-87 and accompanying text *infra*.

35. Under the unemployment compensation statutes, the federal and state governments have substantial powers to investigate the everyday financial matters of employers within their jurisdiction. *See* notes 88-95 and accompanying text *infra*.

36. Regarding cases which have arisen under the unemployment compensation laws, *see* notes 137-54 and accompanying text *infra*. For other cases initiated by Christian schools against governmental agencies, *see* note 12 *supra*.

during the Great Depression.[37] The economic privation experienced by the unemployed during the early 1930's went largely unremedied due to the nonexistence of state or federal unemployment compensation programs.[38] The state legislatures, however, were reluctant to pass comprehensive measures to alleviate the hardships of unemployment.[39] This reluctance stemmed primarily from the legislatures' fear that requiring businesses within their states to pay unemployment taxes would subject those businesses to a competitive disadvantage with the businesses of other states having no such plan.[40] Congress, in passing the Social Security Act of 1935 (Act),[41] effectively eliminated this concern and encouraged states to adopt their own unemployment compensation statutes.[42] Titles III[43] and IX[44] of that Act levied an unemployment wage tax on all covered employers,[45] but credited against this federal tax liability most of the employers' contributions to cer-

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37. *See* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 135 (Bicentennial ed. 1975). The average rate of unemployment in the United States rose from 3.2% in 1929 to 15.9% in 1931. *Id.* The percentage of unemployment remained above 15% for 8 years, reaching the highest figure in the nation's history—24.9%—in 1933. *Id.*

38. Lacking sufficient machinery to cope with such massive social upheavals, the federal and state governments were incapable of ameliorating the tremendous financial hardships experienced by millions of idled workers. *See* Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 25-28 (1945).

39. *See* H.R. REP. NO. 615, 74th Cong., 1st Sess. 8 (1935) (report of Ways and Means Committee accompanying Social Security Act of 1935); Witte, *supra* note 38, at 28.

40. H.R. REP. NO. 615, *supra* note 39, at 5. The Ways and Means Committee report which accompanied the Social Security Act of 1935 provided in pertinent part:

> The failure of the States to enact unemployment insurance laws is due largely to the fact that to do so would handicap their industries in competition with the industries of other States. The States have been unwilling to place this extra financial burden upon their industries. A uniform, Nation-wide tax upon industry, thus removing the principal obstacle in the way of unemployment insurance, is necessary before the States can go ahead. Such a tax would make it possible for the States to enact this socially desirable legislation.

Id.

41. Pub. L. No. 271, 49 Stat. 620 (codified at 42 U.S.C. §§ 301-1397f (1976)).

42. *See* Witte, *supra* note 38, at 32.

43. Pub. L. No. 271, tit. III, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 501-504, 1101-1108, 1321-1324 (1976). Title III was designated "Grants to States for Unemployment Compensation Administration." 49 Stat. at 626.

44. Pub. L. No. 271, tit. IX, 49 Stat. 620 (1935) (now I.R.C. §§ 3301-3311), Title IX was designated "Tax on Employers of Eight or More." 49 Stat. at 639. Four years after the passage of the Social Security Act, Title IX was reenacted as the Federal Unemployment Tax Act. Int. Rev. Code of 1939, ch. 9, subch. C, §§ 1600-1610, 53 Stat. 183-88 (now I.R.C. §§ 3301-3311). The federal unemployment tax was designed to raise revenue to cover only *administrative* expenses of both the federal and state programs; Congress intended the *states* to actually disburse the benefits out of their own funds financed by state unemployment taxes. *See* Witte, *supra* note 38, at 32.

45. For an explanation of which employers are covered by the Act, *see* note 50 *infra*. The original rate of tax established by Title IX of the Social Security Act was 1% of the total wages paid by a covered employer. Pub. L. No. 271, tit. IX, § 901(1), 49 Stat. 639 (1935). The present rate of tax is 3.2%. *See* I.R.C. § 3301.

tified[46] state unemployment funds.[47] As a result of the Act's nationwide application,[48] every state had enacted its own unemployment legislation by 1937.[49]

The history of the unemployment compensation system has been one of steadily increasing coverage, not only with respect to the types and number of employees protected,[50] but also in terms of the amount[51] and duration[52] of benefits received. This expansion is largely attributable to the strong governmental policies and interests which tend to be furthered by the system, including the objectives of 1) alleviating the economic privation of the unemployed;[53] 2) encouraging and accelerating the process of obtaining new employment by assisting the unemployed in the interim period between

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46. For a discussion of the certification process, *see* notes 61-65 and accompanying text *infra*.

47. The original Act provided that up to 90% of the payments made into an approved state unemployment compensation fund could be credited against the 1.0% wage excise tax. Pub. L. No. 271, tit. IX, § 902, 49 Stat. 640 (1935). The present Act still credits 90% of the state payments against the FUTA tax. I.R.C. § 3302(c).

48. Regarding FUTA's provision whereby contributions made into a certified state fund are credited against the FUTA tax, *see* note 46 and accompanying text *supra*.

49. Witte, *supra* note 38, at 34. In 1932, Wisconsin became the first state to enact a successful employment insurance law. *Id.* at 26. Six other states enacted unemployment legislation in the same year the Social Security Act of 1935 was approved. *Id.* at 33. By the end of 1937, all states had enacted similar legislation. *Id.* at 34.

50. The original FUTA applied only to private, profit-making employers who employed eight or more individuals. Social Security Act of 1935, Pub. L. No. 271, tit. IX, § 907(a), (c), 49 Stat. 642-43 (1935). In 1954, coverage was extended to employers of four or more employees, and to certain federal employees. Act to Extend and Improve the Unemployment Compensation Program, Pub. L. No. 767, §§ 1, 4, 68 Stat. 1130 (1954). The Employment Security Amendments of 1970 further extended coverage to employers of only one employee, Employment Security Amendments of 1970, Pub. L. No. 91-373, § 101, 84 Stat. 696, and to nonprofit organizations, state hospitals, and institutions of higher education. Pub. L. No. 91-373, Part A, §§ 101, 104, 84 Stat. 696-97. Most recently in 1976, FUTA was amended to require states to cover public and many private schools, certain governmental organizations, and specified agricultural and domestic employees. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Part I, §§ 101, 112, 113, 90 Stat. 2670. With respect to the 1976 amendments, the Secretary of Labor has stated: "These amendments were designed to provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all the nation's wage and salary earners . . . ." United States Dep't of Labor v. Alabama Dep't of Indus. Relat., slip op. at 5 (Conformity Proceeding, Decision of the Secretary of Labor, Oct. 31, 1979) [hereinafter cited as Conformity Proceeding—Decision of the Secretary].

51. *See* Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181, 196-98, 200-02 (1955); U.S. DEP'T OF LABOR, COMPARISON OF UNEMPLOYMENT INSURANCE LAWS 3-35 to 3-37 (1979).

52. *See* Larson & Murray, *supra* note 51, at 196-98, 202; U.S. DEP'T OF LABOR, *supra* note 51, at 3-35 to 3-37.

53. *See* S. BLAUSTEIN, UNEMPLOYMENT INSURANCE OBJECTIVES AND ISSUES 5-12 (1968). Under the broad policy of providing assistance to individual workers during unemployment, Blaustein defines three subordinate objectives: 1) to assure workers of financial support in a dignified, orderly, and reliable manner during periods of involuntary unemployment; 2) to enable the unemployed worker to maintain his standard of living by adequately replacing his lost wages; and 3) to help the unemployed worker to sustain his earning capacity and take full advantage of the skills and experience gained in previous employment and training. *Id.* at 6-7.

jobs;[54] and 3) strengthening the overall economy and preventing additional unemployment through the achievement of the first two objectives.[55] Because the system has been remarkably successful in furthering these governmental interests,[56] attempts to expand its coverage have, until recently, met little resistance.

As the scope of unemployment compensation coverage expanded,[57] it also developed into a complex federal-state system,[58] under which the federal government has increasingly dictated[59] how the state statutes must be structured.[60] The mechanism that enables Congress to maintain a substantial measure of state compliance with the federal statute is FUTA's certifica-

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54. *Id.* at 8-9. Blaustein has discerned three objectives under the policy of "improving manpower utilization": 1) to encourage or maintain the unemployed worker's incentive to work; 2) to expose unemployed workers to job opportunities; and 3) to enhance the employment potential of unemployed workers. *Id.*

55. *Id.* at 11-12. Under the policy of "general economic stability," Blaustein has found two specific objectives: 1) to counter the deflationary effects of unemployment on the economy; and 2) to preserve flexibility and freedom of choice for private and public economic policy. *Id.*

56. *See The Administration Proposal to Amend the Federal Unemployment Compensation Statutes: Hearings Before the House Comm. on Ways and Means,* 91st Cong., 1st Sess. 2 (1969) (Statement of President Richard M. Nixon); *Phase III: Proposed Changes in the Permanent Federal-State Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means,* 94th Cong., 1st Sess. 2-3 (1975) (Statement of James Corman) [hereinafter cited as *Phase III, 1975 Hearings*].

57. Congress designed the American unemployment compensation system to be a program of employment insurance funded by employers. Bernstein, *Foreward to the Illinois Unemployment Compensation Act,* ILL. ANN. STAT. ch. 48, at IX (Smith-Hurd 1966). Only a portion of the economic hardship caused by unemployment is alleviated by unemployment legislation, however, because state unemployment laws generally limit coverage in three respects: 1) benefits amount to only a percentage of a worker's normal salary; 2) eligibility for benefits is predicated on both a qualification period of employment and a waiting period; and 3) ordinary benefits are limited in duration. Larson & Murray, *supra* note 51, at 196-204. Unlike more generalized relief measures, the unemployment compensation system was intended to provide an idled worker with a partial, temporary shield against economic hardship in order to facilitate his acquisition of new employment. *See* E. WITTE, THE ESSENTIALS OF UNEMPLOYMENT COMPENSATION 157, 159-60 (1936).

Unemployment compensation should be distinguished from other forms of governmental assistance. Unlike welfare payments, the benefits under unemployment compensation 1) are provided to unemployed workers as a matter of right under predetermined standards; 2) are not subject to modification in amount by the exercise of official discretion; 3) are limited to the involuntarily unemployed who, for a certain time prior to unemployment, were in some way attached to the labor market; 4) have a statutorily limited duration; and 5) are paid out of a separate fund financed by payroll taxes. Burns, *Unemployment Compensation and Socio-Economic Objectives,* 55 YALE L.J. 1, 2-4 (1945).

58. Larson & Murray, *supra* note 51, at 206-11. For examples of representative state unemployment compensation acts, *see* 65 CAL. UNEMP. INS. CODE §§ 1-2113 (West 1972); 15 FLA. STAT. ANN. §§ 443.01-.24 (West 1966); ILL. ANN. STAT. ch 48, §§ 300-820 (Smith-Hurd 1966); 20 MICH. COMP. LAWS ANN. §§ 421.1-.501 (1978); 41 OHIO REV. CODE ANN. §§ 4141.01-.99 (Page 1973); PA. STAT. ANN. tit. 43, §§ 751-914 (Purdon 1964 & Supp. 1979-80). For a comparison of all 50 state unemployment compensation laws, *see* U.S. DEP'T OF LABOR, *supra* note 51.

59. *See* Witte, *supra* note 38, at 32.

60. Under Title IX of the Social Security Act of 1935, the original version of FUTA, a state statute was required to comply with only six broad provisions for certification. *See* Pub. L. No. 271, tit. IX, § 903(a), 49 Stat. 626 (now I.R.C. § 3304). The present FUTA has 17 detailed

tion process.[61] Under this process, each state's employment statute is reviewed annually by the Secretary of Labor.[62] States found to comply with the criteria set forth in FUTA are approved[63] and thereafter certified by the Secretary.[64] Since only payments made into a certified state fund entitle the payor to a reduction of his FUTA liability,[65] the state legislatures are provided strong incentive to conform their statutes to new FUTA requirements.[66] Indeed, in many cases, state adoption of new FUTA requirements has become automatic.[67]

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provisions setting forth the state statute certification prerequisites, I.R.C. § 3304, 16 defined terms, *id.* § 3306, including 17 subsections under the term "employment," *id.* § 3306(c), and a new section entitled "State Law Coverage of Services Performed for Nonprofit Organizations or Governmental Entities." *Id.* § 3309.

61. The original statutory provisions setting forth the certification process were contained in the Social Security Act of 1935, Pub. L. No. 271, tit. IX, § 903, 49 Stat. 620 (now I.R.C. § 3304).

62. I.R.C. § 3304(c).

63. *Id.* § 3304(a).

64. *Id.* § 3304(c).

65. *Id.* § 3302(a)(1).

66. Failure by a state to obtain certification of its statute would theoretically result in serious consequences to the state's economy. Since all businesses are required to pay the 3.2% FUTA tax to the federal government unless they receive credit for making payment into a certified *state* plan, I.R.C. § 3302, revocation of a state statute's certification would eliminate the credit and reinstitute full liability for the FUTA tax. *Id.* In a state where certification has been refused, an employer would be paying the full amount of the FUTA tax, or 3.2% of all wages, *id.* § 3301, and the full amount of the state employment security tax, which may range as high as 2.7%. *See, e.g.*, PA. STAT. ANN. tit. 43, § 781(a)(1) (Purdon 1964). The cumulative percentage of wages paid in such a situation would be 5.9%, which is an amount significantly in excess of the present unemployment tax liability of employers in every other American jurisdiction. *See* U.S. DEP'T OF LABOR, *supra* note 51, at 2-39 to 2-40.

No state statute has failed to be certified for any extended period of time. Larson & Murray, *supra* note 51, at 208-10. The extreme complications which would result from noncertification have led the Secretary of Labor and noncomplying states to seek other means, such as negotiations, to resolve problems of conformity. *Id. See* 42 U.S.C. §§ 503-04 (1976) (providing a hearing and appeal process whereby a non-certified state may contest its designation of nonconformity prior to revocation of the FUTA tax credit).

67. Some states adopt provisions required under FUTA in a form that is identical with the Federal Act. *Compare, e.g.*, I.R.C. §§ 3309(b)(1), (2) *with* PA. STAT. ANN. tit. 43, § 753(1)(4)(8)(a), (b) (Purdon Supp. 1979). The legislative history of recent amendments to FUTA indicates that Congress considers state adoption of the new FUTA provisions to be mandatory. *See* S. REP. NO. 1265, 94th Cong., 1st Sess. 1, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997. This Senate Report provided:

> The Committee on Finance, to which was referred [this] bill *to require States* to extend unemployment compensation coverage to certain previously uncovered workers; to increase the amount of the wages subject to the Federal unemployment tax; to increase the rate of such tax; and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

Id. (emphasis added). One observer has stated that

> with notable exceptions, state coverage is shaped to conform with federal law. In this matter, indeed, federal leadership is so far accepted that the charge of federal "dictation" has not, as it has in other aspects of unemployment compensation, prevented some expansion of the system by federal initiative. . . . A majority of states have . . . copied th[e] federal exclusions . . . substantially verbatim.

Willcox, *The Coverage of Unemployment Compensation Laws*, 8 VAND. L. REV. 245 (1955).

C. *The Relevant Statutory Provisions*

Several aspects of the federal-state program of unemployment compensation are having a direct and significant impact on the day-to-day operations of church-related schools. Of special concern to these schools is the fact that the unemployment laws: 1) require Christian schools to elect between contribution[68] and reimbursement[69] modes of liability and to make unemployment tax payments according to the method they choose; 2) necessitate the keeping of records, the filing of reports, and the payment of penalties in the event of noncompliance with the laws;[70] and 3) may result in the schools being forced to contest the liability evaluations made by state employment agencies regarding the validity of employment termination.[71]

1. *Types of Employer Liability*

Most employers are required by state laws to make periodic tax payments or "contributions" into their state's unemployment compensation fund.[72] The frequency and amount of an employer's contributions are determined by the state administrative agency in accordance with both federal and state law.[73] One technique utilized by every state to determine the contribution rate of particular employers is "experience rating"—a system which triggers variations in an employer's contribution rate based on the amount of benefits previously paid to the former employees of that employer.[74] However, because employers are required to make contributions over fixed intervals at predetermined rates,[75] the unemployment compensation laws do not assure that the state fund will receive exact reimbursement from a given employer for the amount of benefits received by that employer's idled workers.[76] Hence, unemployment compensation functions in a manner similar to employer-bought unemployment insurance in that the amount of benefits actually received by the unemployed of a given

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68. For an explanation of the contribution mode of employer liability, *see* notes 72-77 and accompanying text *infra*.

69. For an explanation of the reimbursement mode of employer liability, *see* notes 78-87 and accompanying text *infra*.

70. *See* notes 88-100 and accompanying text *infra*.

71. *See* notes 101-07 and accompanying text *infra*.

72. *See generally* Larson & Murray, *supra* note 51.

73. *See id. See also* I.R.C. § 3302(a)(1).

74. I.R.C. § 3302(a)(1). *See also* Witte, *supra* note 38, at 32, 34-43.

75. Eberling, *Financing of Benefits in Unemployment Insurance*, 17 VAND. L. REV. 759, 760 (1964). If an employer's state contribution rate is diminished by "experience rating," it is entitled to a corresponding credit against its FUTA tax liability. I.R.C. § 3302(b). For Pennsylvania's experience factor provision, *see* PA. STAT. ANN. tit. 43, § 781.1(a), (d) (Purdon Supp. 1979). Under Pennsylvania's experience rating system, an employer's rate of contributions may vary from 0.3% to 4.0% of the wages paid. *Id.* at § 781.1(a). For a general discussion of experience rating, *see* Clagre, *The Economics of Unemployment Compensation*, 55 YALE L.J. 53, 57-64 (1945); Palomba, *Experience Rating: A 30-Year Controversy*, 19 LAB. L.J. 28 (1968).

76. *See, e.g.*, PA. STAT. ANN. tit. 43, § 781(e) (Purdon Supp. 1979).

organization may differ substantially from the amount the organization previously paid into the fund.[77]

In lieu of utilizing the standard contribution mode of determining liability under state unemployment statutes, nonprofit organizations, such as church schools, are permitted under FUTA to elect the "reimbursement method" for determining tax liability.[78] Under this method, an employer is required to pay into the state fund the exact amount of benefits received by the unemployed of that organization.[79] In contrast to the standard method, payments under the election provisions are, in effect, *reimbursements* made *after* the benefit period.[80]

The reimbursement mode of computing liability provides several advantages for nonprofit institutions. First, it enables organizations to avoid making contributions as long as their former employees do not receive unemployment compensation benefits.[81] Second, until reimbursements are necessitated, it allows a nonprofit organization to retain and collect interest on funds which would otherwise have been payable as contributions.[82] Finally, it tends to assure that the nonprofit organization's funds, which are often derived from charitable contributions, will assist the organization's own unemployed rather than the unemployed of the state in general.[83]

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77. *See* PA. DEP'T OF LABOR AND INDUSTRY, REIMBURSEMENT? OR CONTRIBUTION? YOUR BEST METHOD OF COVERAGE FOR MANDATORY UNEMPLOYMENT COMPENSATION 4 (1978) [hereinafter cited as REIMBURSEMENT OR CONTRIBUTION].

78. *See* Note, *Charity Versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357, 359 (1963).

79. *See* I.R.C. §§ 3303(e)(3), 3309(a)(2).

80. *Id.* § 3309(a)(2). The federal statute describes reimbursement payments under this election system as being in "amounts *equal to* the amounts of compensation attributable [to the unemployed of the nonprofit organization]." *Id.* (emphasis added). A pamphlet published by the Pennsylvania Department of Labor and Industry, describing the reimbursement method, states that a "nonprofit employer must pay back to the State [Unemployment Compensation] Fund on a dollar-for-dollar basis, all claims and other charges made to his/her account." REIMBURSEMENT OR CONTRIBUTION, *supra* note 77, at 5.

Pennsylvania's reimbursement election system is illustrative of the systems which states have provided for nonprofit organizations. *See* PA. STAT. ANN. tit. 43, §§ 901-910 (Purdon Supp. 1979). A Pennsylvania nonprofit organization exercises its election by filing a written notice within 30 days immediately following the date it comes within the general requirements of the Act, *id.* § 905(b), or 30 days prior to the beginning of any taxable year. *Id.* § 905(c). The nonprofit organization is then required to reimburse the state on a quarterly basis for all benefits paid to the organization's unemployed. *Id.* § 906(a).

81. *See* REIMBURSEMENT OR CONTRIBUTION, *supra* note 77, at 5. The attractiveness of the election method is enhanced in some states, such as Pennsylvania, which provide for group accounts under which two or more nonprofit organizations agree to share the cost of reimbursement made to the state unemployment fund for benefits paid to their employed. *See, e.g.*, PA. STAT. ANN. tit. 43, § 909 (Purdon Supp. 1979).

82. *See* REIMBURSEMENT OR CONTRIBUTION, *supra* note 77, at 4.

83. The Senate Report accompanying the Employment Security Amendments of 1970 provided in pertinent part:

> The States would be required also to provide nonprofit organizations with the option of reimbursing the State for unemployment compensation payments attributable to service with the organization in lieu of paying contributions under the normal tax provisions of

There are, however, disadvantages to the election provisions which may tend to outweigh the advantages of the system.[84] For instance, some unemployment agencies have interpreted the election provisions to mean that a "reimbursable employer cannot file for relief from charges in cases where an error has been made or in cases where [benefits are] being paid to someone who left their employ without good cause and is subsequently hired and laid off by another employer within the same 4 to 5 quarter period."[85] Also, since the reimbursement method offers little of the predictability of the contribution method, organizations must provide sufficient cash reserves to meet a wide range of potential liability.[86] Finally, it has been observed that "a massive layoff for whatever reason would have catastrophic effects on reimbursable employers since they will be liable, dollar-for-dollar, for every claim made against their account."[87]

2. *Means of Assuring Compliance*

Another provision of the unemployment compensation laws which has a significant impact on the routine affairs of church-related schools is the requirement that covered employers maintain and submit to the state detailed records of their operations.[88] These records facilitate state administration of

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the State law. In effect, the nonprofit organizations would be allowed to adopt *a form of self-insurance*. Under the reimbursement method of financing, a nonprofit organization whose workers experience no compensated unemployment in a year would have no unemployment insurance costs for that year. *The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises*

S. REP. NO. 752, 91st Cong., 2d Sess. 14, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3606, 3618 (emphasis added).

One of the few cases construing the reimbursement election provision is Wilmington Medical Center v. Unemployment Ins. App. Bd., 346 A.2d 181 (Del. Super. 1975). The *Wilmington* court stated:

> It appears that the intent of Congress in enacting the reimbursement method of financing was to enable nonprofit organizations to escape the burden of contributing greater amounts to the Unemployment Compensation Fund than the costs which were incurred directly by elections of the nonprofit organizations in a given year. This was seen by the Senate as desirable public policy in light of the charitable nature of such organizations.

Id. at 183.

84. REIMBURSEMENT OR CONTRIBUTION, *supra* note 77, at 6.

85. *See id. But see* Wilmington Medical Center v. Unemployment Ins. Appeal Bd., 346 A.2d 181 (Del. Super. 1975) (holding that a nonprofit employer would not be liable for any amount of reimbursement where an employee left his job without good cause and was subsequently hired and fired by another employer).

86. *See* REIMBURSEMENT OR CONTRIBUTION, *supra* note 77, at 6, 7.

87. *Id.* at 7. The quoted language indicates a recognition that electing to make reimbursements could, under severe circumstances, result in the insolvency and eventual demise of a nonprofit organization. The Pennsylvania Department of Labor provided a telling example of this potential for staggering liability: an organization, laying off 10 employees who thereafter draw the maximum benefit rate for 30 weeks, would be liable for a reimbursement of $42,000 in one year. *Id.* at 5.

88. *See generally* 65 CAL. UNEMP. INS. CODE § 1085 (West Supp. 1979); 15 FLA. STAT. ANN. §§ 443.12(7), .15(2)(a) (West 1966); ILL. ANN. STAT. ch. 48, §§ 630-40 (Smith-Hurd 1966);

the laws[89] and provide the Labor Department with statistical data used to analyze national employment trends.[90]

The Pennsylvania statute, for instance, requires employers to file reports with the state[91] and maintain records open for inspection[92] that set forth the wages paid to each employee[93] and other information necessary to compute the organization's tax liability.[94] In addition, the Pennsylvania Department of Labor and Industry has promulgated regulations requiring employers to retain, for four years, other records "such as cashbooks, journals, ledgers, and corporate minutes" in a central place for department inspection purposes.[95] Moreover, FUTA allows states that utilize the reimbursement method[96] to "provide safeguards to ensure that [nonprofit organizations] so electing will make the payments required under such elections."[97] Pennsylvania has provided two types of safeguards to ensure payments by electing nonprofit organizations: 1) the posting of a surety bond to insure compliance with the elective provisions;[98] and 2) post-violation sanctions in the form of interest and penalties.[99] Pennsylvania has also adopted separate sanctions for employers who fail to keep records in conformity with

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20 MICH. COMP. LAWS ANN. § 421.11(b) (1978); N.Y. LAB. LAW § 575 (McKinney 1977); 41 OHIO REV. CODE ANN. § 4141.18 (Page 1973); TEX. LAB. CODE ANN. tit. 15, § 5221b-9(a) (Vernon 1962).

89. These reports are used to determine the existence and the extent of an employer's unemployment tax liability. *See* statutory provisions cited note 88 *supra*.

90. *See Phase III, 1975 Hearings, supra* note 56, at 259-388 (statement of Christopher Jehn, Public Research Institute of the Center of Naval Analysis).

91. PA. STAT. ANN. tit. 43, §§ 766, 784 (Purdon 1964). Regarding the specific reports to be filed by a Pennsylvania employer, *see* 34 PA. CODE §§ 63.51-.56. Each employer in Pennsylvania is required to keep "clear, accurate, and complete employment and payroll records," including the full name, social security account number and wage rate of each employee. *Id.* § 63.64. Beyond these minimal requirements, the employer is also obligated to keep business records, such as cash books, journals, ledgers, and corporate minutes, for four years in order to provide the Bureau of Employment Security with information on each employee concerning 1) the total remuneration paid according to type of payment; 2) the amounts and dates of traveling and other business expenses incurred by the employee and reimbursed by the employer; 3) place of employment; 4) full-time scheduled hours; 5) a daily attendance record, showing the dates on which the employee actually worked and the time lost due to reasons other than lack of work; and 6) if separated, the date and the reasons for separation. *Id.*

92. PA. STAT. ANN. tit. 43, § 766 (Purdon 1964). The Pennsylvania statute requires the records to be open for inspection at "any reasonable time, and as often as may be deemed necessary." *Id.*

93. *Id.* §§ 766, 784(a) (Purdon 1964).

94. *Id.* § 766.

95. 34 PA. CODE § 63.64.

96. For an explanation of the reimbursement mode of unemployment compensation payments, *see* notes 78-87 and accompanying text *supra*.

97. *See* I.R.C. § 3309(a)(2).

98. PA. STAT. ANN. tit. 43, § 906(a) (Purdon Supp. 1979). The bond is set at 1% of the organization's taxable wages for the four most recent calendar quarters prior to the election of reimbursements. *Id.*

99. *Id.* § 906(c). Overdue reimbursement payments are subject to penalties of one to five dollars per reporting period, *id.* § 766, and interest at the rate of 1% per month from the date they become due until the date they are paid. *Id.* § 788.

the regulations adopted by the Pennsylvania Department of Labor and Industry.[100]

3. *Determinations of Eligibility for Benefits*

The third aspect of the federal-state unemployment program having a noteworthy impact on church-related schools is the system whereby the state employment agencies analyze the reasons for the termination of a worker's employment in order to ascertain the employer's tax liability. These agency determinations are a prolific source of litigation,[101] since every decision adversely affects either the employer's tax liability or the employee's entitlement to benefits. It is well-settled in most states that an employee is entitled to benefits if he was laid off due to forces outside his control, such as plant shutdowns or work shortages;[102] however, the worker clearly has no right to benefits if he quit for purely personal reasons[103] or was fired for gross misconduct.[104] The reason for most of the litigation in this area[105] is the vagueness of the statutory "good cause" standard[106] used to determine whether

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100. *Id.* § 766. A failure on the part of an employer to file or complete in satisfactory manner a periodic report showing the amount of his contribution or wage payments results in a nominal penalty of one to five dollars per reporting period. *Id.*

101. *See generally* Annot., 35 A.L.R.3d 1129 (1971); Annot., 26 A.L.R.3d 1356 (1967); Annot., 89 A.L.R.2d 1089 (1963); Annot., 41 A.L.R.2d 1158 (1955).

102. *See* Harrison, *Statutory Purpose and Involuntary Unemployment*, 55 YALE L.J. 117 (1945).

103. For a discussion of when the voluntary termination of one's employment constitutes a valid ground for the denial of benefits, *see* Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147, 154-59 (1945).

104. For a discussion of when misconduct constitutes a ground for the denial of benefits, *see id.* at 160-66.

105. Various jurisdictions have taken divergent positions on whether, under a given factual situation, an employee is entitled to benefits. With respect to acts or threats of physical violence as grounds for the denial of benefits, *compare* Carter v. Michigan Employment Secur. Comm'n, 364 Mich. 538, 111 N.W.2d 817 (1961) (denying benefits to employee who threatened to punch employer in the nose) *and* Hunt v. Unemployment Comp. Bd. of Review, 197 Pa. Super. Ct. 435, 180 A.2d 108 (1962) (barring award where employee made threatening remarks and baited the employer to fight) *with* Guest v. Administrator, Unemployment Comp. Act, 22 Conn. Supp. 458, 174 A.2d 545 (1961) (benefits awarded even though employee was fired for striking supervisor) *and* Gatlin v. Brown, 154 So. 2d 224 (La. App. 1963) (allowing award where employee was charged with damaging company property and endangering a foreman's safety in the operation of a motor vehicle). With respect to the sufficiency of profane language or backtalk as a ground for the denial of benefits, *compare* Gilbert Co. v. Kordorsky, 134 Conn. 209, 56 A.2d 169 (1947) (benefits denied where employee loudly told his superiors that his employer was "gypping" him) *and* Jackson v. Brown, 136 So. 2d 329 (La. App. 1961) (barring award where employee told her foreman, using abusive and profane language, that she would leave her work whenever she desired) *with* Martino v. Administrator, Unemployment Comp. Act, 20 Conn. Supp. 394, 136 A.2d 810 (1957) (allowing award where employee cursed at his employer) *and* Kimble v. Brown, 162 So. 2d 415 (La. App. 1964) (allowing award where employee accused his employer of laziness).

106. *See* U.S. DEP'T OF LABOR, *supra* note 51, at 4-27, 4-28, table 401. For a discussion of the "good cause" standard, *see* Davidson, *Unemployment Insurance: Good Cause for Leaving Employment*, 20 CLEV. ST. L. REV. 597 (1971). *See also* cases cited note 105 *supra*.

an employer or employee was justified in deciding to terminate the employment relationship.[107]

D. *The 1976 Amendments to the Unemployment Compensation Laws*

1. *Background and Effect of the Amendments*

Before 1976, all public, private, and religious schools were granted a blanket exclusion from the requirements of unemployment compensation legislation under section 3309(b)(3) of FUTA.[108] Due to the high levels of employment traditionally enjoyed by the teaching profession,[109] little impetus existed to eliminate this exclusion. However, unemployment among teachers increased dramatically in the early 1970's,[110] and, in 1976, Congress responded to the request of public school teachers' unions[111] by eliminating

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107. *See* Davidson, *supra* note 106, at 597-602. The law in the area of eligibility has changed significantly since the inception of unemployment compensation. Under the older versions of FUTA, eligibility was contingent upon a finding that the prevailing economic climate, and not the employee, was primarily responsible for his unemployment. As one early court stated:

> Clearly the Unemployment Tax Act was intended to care for *periods of economic stress when* workers, *through no fault of their own* were *unable to find* employment. It was intended . . . to take care of those whose *enforced* lack of employment entailed financial loss and whose personal resources were insufficient for a proper standard of living.

Personal Finance Co. of Braddock v. United States, 86 F. Supp. 779, 786 (D. Del. 1949) (emphasis added). In stark contrast to the classic view of benefit eligibility is the reasoning of a recent California case, Jacobs v. California Unemployment Ins. App. Bd., 25 Cal. App. 3d 1035, 102 Cal. Rptr. 364 (1972), wherein the discharge of an alcoholic employee for recurring absenteeism caused by chronic intoxication was not found to be adequate cause for the denial of benefits. *Id.* at 1039-40, 25 Cal. Rptr. at 367-68.

108. *See* Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104(b)(1), 84 Stat. 698 (now I.R.C. § 3309(b)(3)). Prior to 1976, § 3309(b) provided in pertinent part:

> (b) Section Not To Apply to Certain Service.—This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) *in the employ of a school which is not an institution of higher education* . . . .

Pub. L. No. 91-373, § 104(b)(1)-(3), 84 Stat. 698 (emphasis added).

109. *See Phase III, 1975 Hearings, supra* note 56, at 15 (statement of Hon. John T. Dunlop, Secretary of Labor); *id.* at 435 (statement of James A. Harris, President, Nat'l Educ. Ass'n).

110. *Id.* at 433 (statement of Terry Herndon, Executive Director, Nat'l Educ. Ass'n).

111. *Id.* at 435-38 (statement of James A. Harris, President, Nat'l Educ. Ass'n); *id.* at 432-40 (statement of Terry Herndon, Executive Director, Nat'l Educ. Ass'n); *Extend and Modify the Federal Supplemental Benefits and Special Unemployment Assistance Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 113-20 (1976) (statement of Judith M. Owens, President, N.J. Educ. Ass'n); *Phase II: Extending Temporary Benefits: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 194, 196 (1975) (statement of James A. Harris, President, Nat'l Educ. Ass'n); *Administration and Other Proposals on Unemployment Compensation: Hearings Before the House Comm. on Ways and*

FUTA's general exclusion for elementary and secondary schools.[112] The Senate Report accompanying the bill manifested the intent of Congress to bring both public and *nonreligious private* elementary and secondary schools within the scope of FUTA.[113]

With the elimination of the section 3309(b)(3) blanket exclusion for schools, Christian schools are presently within FUTA's scope unless they can demonstrate that they are excepted by some other section which excludes services performed, such as section 3309(b)(1) or section 3309(b)(2). These sections provide that FUTA shall not apply to service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order . . . .[114]

Although the Labor Department contends that the legislative history of section 3309(b)(1) negatives any congressional intent to exempt church-related schools from FUTA,[115] at least one federal court[116] and a state attorney gen-

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Means, 93d Cong., 2d Sess. 251-68 (1974) (statement of Dr. Helen D. Wise, President, Nat'l Educ. Ass'n).

112. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2670.

113. In the Senate Report accompanying the Unemployment Compensation Amendments of 1976, the following explanation was given for the changes regarding nonprofit elementary and secondary schools:

> Prior to the 1970 amendments, nonprofit organizations, which are exempt from taxation under the Internal Revenue Code, were covered as employers for unemployment compensation purposes only at the option of the States. The 1970 amendments required States to provide coverage for nonprofit employers who have at least four employees in at least 20 weeks of the year. However, an exception in the law allows States to exclude from coverage nonprofit elementary and secondary schools. *The committee bill would repeal this exclusion, thus requiring coverage for such schools on the same basis as it is required for other nonprofit entities.*

S. REP. NO. 1265, 94th Cong., 2d Sess. 9, 10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6005-06 (emphasis added).

114. I.R.C. § 3309(b)(1), (2). A separate FUTA exclusion applies to all employers "not employing four or more individuals during any 20 weeks of the year." I.R.C. § 3309(c). While some church-related schools may commence operations with only three employees (for example, three teachers teaching grades one through three, with the minister, excluded from FUTA coverage by § 3309(b)(2), acting as supervisor and administrator), it is nonetheless evidence that § 3309(c) does not act to exclude a significant proportion of Christian schools from FUTA.

115. *See* note 124 *infra*. Regarding the interpretation to be accorded § 3309(b)(1), both the House and Senate Reports accompanying the bill stated:

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a

eral[117] have reached the contrary conclusion that section 3309(b)(1) does exclude church schools from FUTA coverage. Under subsection (2) of section 3309(b) there appears to be no dispute that the service of a minister, employed in a dual capacity as minister of the church and principal of the school, is excluded from FUTA coverage;[118] however, no indication has emerged as to whether other church officers serving in the school qualify for a section 3309(b)(2) exemption as "member[s] of a religious order."[119]

2. *Administrative Interpretation of the 1976 Amendments*

In 1978, United States Secretary of Labor, Raymond Marshall, issued an opinion letter[120] officially stating for the first time[121] that church-related

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church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R. REP. NO. 612, 91st Cong., 1st Sess. 44 (1969); S. REP. NO. 752, 91st Cong., 2d Sess. 48 (1970). For a discussion of the Labor Department's construction of § 3309(b)(1), *see* notes 120-34 & 188 and accompanying text *infra*.

116. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 7-9 (C.D. Cal. Sept. 21, 1979). For a discussion of *Grace Brethren*, *see* notes 143-49 and accompanying text *infra*. A number of state courts have agreed that the Labor Department's position is contrary to the plain language of the statute. *See* Trinity Evangelical Lutheran Church v. Department of Indus. Relat., No. CV 78-500325 (Cir. Ct. Mobile County, Ala. Jan. 27, 1979); Roman Catholic Church v. Louisiana, No. 219, 660 (19th Jud. Dist. Ct., East Baton Rouge Parish, La. Aug. 31, 1979) (notice of appeal filed Oct. 17, 1979); Grace Lutheran Church v. North Dakota Employment Security Bureau, Civ. No. 28234 (N.D. Dist. Ct., Oct. 10, 1979); Employment Division v. Archdiocese of Portland, 42 Or. App. 421, 600 P.2d 926 (1979); *In re* Determination of Unemployment Ins. Coverage, No. CA 78-248 (S.D. Cir. Ct., Mar. 19, 1979), *appeal docketed*, No. 12801 (S.D. Sup. Ct., May 25, 1979).

117. Opinion of the Attorney General of Michigan, No. 5434 (January 19, 1979). For the relevant text of this opinion, *see* note 190 *infra*. *See also* United States Dep't of Labor v. Alabama Dep't of Indus. Relat., slip op. at 7-9 (Conformity Proceeding, Recommended Decision of the Administrative Law Judge, Oct. 11, 1979), *appeal docketed*, No. 79-3968 (5th Cir. Dec. 11, 1979) [hereinafter cited as Conformity Proceeding—Recommended Decision].

118. The Labor Department has stated that FUTA § 3309(b)(2) "is not at issue." Directive from Lawrence W. Rogers, Administrator of Field Operations, Employment and Training Administration, U.S. Dep't of Labor, to all State Employment Security Agencies, at 2 (May 30, 1978) [hereinafter cited as Directive from Rogers]. This contention would appear to be based on the fact that § 3309(b)(2) excludes all service performed by a particular profession and obviates the need to determine what constitutes "service in the employ of a church" (which is required under § 3309(b)(1)). *See* text accompanying note 114 *supra*.

119. *See* text accompanying note 114 *supra*.

120. Letter from the Honorable F. Ray Marshall to the Most Reverend Thomas E. Kelly, O.P. (April 18, 1978) [hereinafter cited as Letter from Marshall], *quoted in* Independent Baptist Church v. Tennessee, 468 F. Supp. 71, 74 (E.D. Tenn. 1978).

121. An administrative law judge recently stated that immediately after the 1976 amendments to FUTA were passed, the Labor Department issued two nonpublic memoranda to the states indicating that church-school employees were still excluded from FUTA under § 3309(b)(1). Conformity Proceedings-Recommended Decision, *supra* note 117, at 6. These contemporaneous statutory constructions were in direct conflict with a May 30, 1978, directive of the Labor

elementary and secondary schools are "clearly covered" by FUTA.[122] The Secretary's opinion was formulated in response to the contentions of the United States Catholic Conference, an organization representing the nation's parochial school system, that parochial schools should be excluded from FUTA coverage on both statutory and constitutional grounds.[123]

Based on this determination by Secretary Marshall, a directive was issued from the United States Department of Labor to all state employment security agencies on May 30, 1978.[124] In that directive, Lawrence W. Rogers, the Labor Department's Administrator of Field Operations, informed the states that "[b]y repealing the former exclusion in section 3309(b)(3) of

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Department. *Id.* at 7. For a discussion of the pertinent parts of this May 30, 1978, directive, *see* notes 124-25 and accompanying text *infra*.

122. Letter from Marshall, *supra* note 120, at 1. In this letter, Secretary Marshall construed the 1976 amendments to FUTA as follows:

> In light of the repeal of 3309(b)(3), we think the only services performed in [church-related] schools that may reasonably be considered within the scope of the exclusion permitted by section 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools.
>
> We believe also that unemployment insurance coverage of employees of church-related schools is constitutionally permissible. This view is based on a thorough review of relevant court decisions and application of the tests of constitutionality that have been advanced in deciding First Amendment issues.
>
> . . . .
>
> I trust this letter clearly expresses the Department's position.

Letter from Marshall, *supra* note 120, at 1, 2.

123. Memorandum of Law prepared by George E. Reed and Gerald C. Tobin, United States Catholic Conference, for submission to the United States Labor Department (December 21, 1977). In its memorandum, the United States Catholic Conference made the following arguments: 1) the parochial school is an integral part of the church and is essentially religious, *id.* at 3; 2) neither the legislative history of the 1970 FUTA amendments nor that of the 1976 amendments provides support for the contention that parochial schools were meant to be included under the Act, *id.* at 5; 3) the term "church" has consistently been interpreted in the Internal Revenue Code to include parochial schools, *id.* at 6; 4) the parochial schools meet the necessary requirements for exemptions under § 3309(b)(1)(B) of FUTA, *id.* at 10; 5) the decisions of the United States Supreme Court in the church-state field have repeatedly defined Catholic schools as primarily operated for religious purposes and completely controlled by the Catholic Church, *id.* at 11; and 6) the imposition of the unemployment compensation tax over parochial schools has the effect of entangling the state in church affairs and, therefore, violates the Constitution of the United States. *Id.* at 14.

124. Directive from Rogers, *supra* note 118, at 2-3, *cited in* Independent Baptist Church v. Tennessee, 468 F. Supp. 71, 74 (E.D. Tenn. 1978). This directive provides in pertinent part:

> The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA, (and aside from the permitted (b)(2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementnary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b)(1)(B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b)(1)(B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

Directive from Rogers, *supra*, at 2-3.

the Federal Unemployment Tax Act (FUTA) relating to services for educational institutions, Congress clearly intended to extend coverage to services for church-related schools."[125] No citation was made to any congressional history to substantiate this assertion. Rogers further indicated that states which had not yet done so were required to enact legislation paralleling the 1976 FUTA amendments[126] and to inform the church schools of their newly determined coverage.[127] Within months, most of the states had complied with the Labor Department's directive.[128]

Recently, the Secretary of Labor issued a determination denying certification of the unemployment compensation statutes of Nevada[129] and Alabama[130] due to the refusal of these states to require church schools to pay unemployment taxes.[131] In that determination, the Secretary reaffirmed the prior position of the Labor Department that 1) the schools are not excluded by FUTA section 3309(b)(1);[132] 2) Congress intended to bring church schools within FUTA's coverage by repealing FUTA section 3309(b)(3);[133] and 3) unemployment compensation coverage of Christian schools does not violate the first amendment religion clauses.[134]

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125. Directive from Rogers, *supra* note 118, at 2.

126. *Id.* at 4.

127. *Id.* at 3.

128. *See, e.g.*, Act of Jan. 30, 1978, ch. 2, § 36.5, 1978 Cal. Stats. 6 (eff. Jan. 30, 1978) (amending 65 CAL. UNEMP. INS. CODE § 634.5(c) (West Supp. 1979)); Act of June 16, 1977, ch. 77-262, 1977 Fla. Laws 1282 (eff. Jan. 1, 1978) (amending 15 FLA. STAT. ANN. § 443.03(5)(d)3 (West Supp. 1979)); Act of Nov. 9, 1977, Pub. L. No. ___, 1977 Ill. Laws 80-1, § 1 (eff. Nov. 9, 1977) (amending ILL. ANN. STAT. ch. 48, § 330.C (Smith-Hurd Supp. 1979)); Act of Dec. 22, 1977, Pub. L. No. 277, 1977 Mich. Pub. Acts 937 (eff. Jan. 1, 1978) (amending 20 MICH. COMP. LAWS ANN. § 421.43(o)(3) (West 1978)); 1977 N.Y. Laws ch. 675, § 10 (eff. Jan. 1, 1978) (amending N.Y. LAB. LAW § 575 (McKinney 1977)); Act of July 6, 1977, Pub. L. No. 22, § 1, 1977 Pa. Laws 41 (eff. Jan. 1, 1978) (amending PA. STAT. ANN. tit. 43, § 753(1)(4)(7) (Purdons 1964)); Act of June 10, 1977, ch. 368, § 17, 1977 Tex. Gen. Laws 981 (eff. Jan. 1, 1978) (amending TEX. LAB. CODE ANN. tit. 15, § 5221b-17(g)(5)(E), (H)).

129. NEV. REV. STAT. §§ 612.010-.760 (1967).

130. ALA. CODE tit. 26, §§ 180-252 (1958).

131. Conformity Proceeding—Decision of the Secretary, *supra* note 50, at 2.

132. *Id.* at 6a, 9-10.

133. *Id.* at 10-11.

134. *Id.* at 11-16. In determining that the unemployment compensation laws do not violate the first amendment religious rights of church-related schools, the Secretary maintained that the laws create no excessive entanglement of church and state. *Id.* at 12. The Secretary stated that "there would be no need to become involved in . . . resolving disputes as to church doctrines in order to resolve claims for benefits," and since "the surveillance and monitoring occur primarily at the governmental level and do not require interference with the internal operations of the schools, the entanglement is not excessive." *Id.* at 12. For countervailing considerations to this argument, *see* notes 340-43 & 368 and accompanying text *infra*. The Secretary also maintained that since "FUTA does not *mandate* that state insurance laws deny any individuals unemployment benefits," the federal law does not require potentially entangling "good cause" determinations with respect to the unemployed of Christian schools. *Id.* at 13 (emphasis in original).

In this argument, the Secretary appears to be stating that the *federal* law is not unconstitutional as applied to church-related schools because it contains no provision requiring the denial of benefits when "good cause" for the termination is lacking, and because only the *state* laws have such provisions which they are free to delete. This contention, however, appears to ignore

E. *Recent Litigation Spawned by Mandatory Coverage*

Christian schools have recently filed suits in both state[135] and federal[136] courts seeking to enjoin the state unemployment security bureaus from levying unemployment compensation taxes against them. The federal court litigation has been initiated in California,[137] Tennessee,[138] Ohio,[139] and Pennsylvania.[140] All but the California case have been summarily disposed of in favor of the states on the jurisdictional basis of the Tax Injunction Act of 1937,[141] which prevents federal district courts from enjoining the assessment, levy, or collection of any state tax when a "plain, speedy and efficient remedy may be had in the courts of such State."[142]

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the fact that the unemployment compensation laws are a closely interrelated federal-state *system* of legislation, *see* notes 58-60 and accompanying text *supra*, and that there are both practical and policy reasons why the laws have never awarded (and never were intended to award) benefits to all applicants regardless of the reasons for termination of their employment. *See* note 57 *supra*. In addition, it is clear that even if the states *did* eliminate all eligibility requirements for benefits for ex-employees of Christian schools, there would be a substantial increase in the schools' "experience rating" or reimbursement liability and, thus, the existing free exercise burdens on the schools would be exacerbated. *See* notes 318-33 and accompanying text *infra*.

The Secretary also distinguished NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979), *see* notes 205-18 & 245-52 and accompanying text *infra*, on the basis that, unlike the NLRA in *Catholic Bishop of Chicago*, the unemployment laws in the instant decision did not have a "chilling effect" on the discretion of Christian school administrators or entail "excessive entanglement" of church and state. *Id.* at 14-15. For an analysis reaching a contrary conclusion, *see* notes 342 & 365-69 and accompanying text *infra*.

Finally, the Secretary concluded that imposing a uniform tax generally applicable to all schools, whether secular or religious, did not entail any free exercise problems because of the Court's holding in Braunfeld v. Brown, 336 U.S. 599 (1961), "where the court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive." Conformity Proceeding—Decision of the Secretary, *supra* note 50, at 15. For an analysis to the contrary, *see* notes 344-48 and accompanying text *infra*.

135. *See* notes 150-54 and accompanying text *infra*.

136. *See* notes 137-49 and accompanying text *infra*.

137. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP (C.D. Cal. Sept. 21, 1979).

138. Independent Baptist Church v. Tennessee, 468 F. Supp. 71 (E.D. Tenn. 1978). *Independent Baptist* involved a suit brought by the administrators of forty elementary and secondary Christian schools seeking injunctive relief from the imposition of Tennessee's unemployment compensation laws upon them. *Id.* at 73.

139. St. John Lutheran Church, Inc. v. Giles, No. C78-1516 (N.D. Ohio Jan. 18, 1979) (mem.).

140. Germantown Friends School v. Joseph, No. 79-1539 (E.D. Pa. Sept. 6, 1979) (involving two Philadelphia Quaker schools operated by separate "monthly meetings," or local congregations, of the Society of Friends).

141. 28 U.S.C. § 1341 (1976).

142. *Id.* The court in Independent Baptist Church v. Tennessee, 468 F. Supp. 71 (E.D. Tenn. 1978), concluded that the plaintiffs had a "plain, speedy and efficient remedy" in Tennessee's state courts and, thus, the suit was dismissed. *Id.* at 75. The court in St. John Lutheran Church, Inc. v. Giles, No. C78-1516 (N.D. Ohio Jan. 18, 1979), remanded the case to the county court on the same basis. *Id.* slip op. at 3, 4 (mem.). The Tax Injunction Act of 1937 was also the basis upon which suit was dismissed in Germantown Friends School v. Joseph, No. 79-1539, slip op. at 2, 14 (E.D. Pa. Sept. 6, 1979).

The district court in *Grace Brethren Church v. California*[143] found the Tax Injunction Act to be inapplicable to that case because the plaintiffs did not have a certain remedy in the state court,[144] and because the very process of determining whether the schools were subject to taxation violated their free exercise rights.[145] Having thus found jurisdiction to decide the case, the *Grace Brethren* court enjoined the state from collecting unemployment compensation taxes from the schools.[146] The court based its injunction on separate findings that 1) the schools came within FUTA's section 3309(b)(1)(A) "church" exception;[147] 2) the imposition and collection of the tax was unconstitutional due to "excessive entanglement";[148] and 3) the schools would possibly suffer irreparable harm in the absence of an injunction.[149]

Several unemployment compensation cases have also been initiated by Christian schools in the state courts.[150] The state court cases which have actually reached the substantive issues have all been decided at the trial level in favor of the schools.[151] In *Independent Baptist Church v. Tennessee*,[152] for example, the trial court ignored the statutory issues, finding that the Baptist schools were an integral part of the church[153] and that any at-

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143. Nos. CV 79-93 MRP, CV 79-162 MRP (C.D. Cal. Sept. 21, 1979). The action brought by Grace Brethren Church was consolidated for decision with a similar suit, Lutheran Church—Missouri Synod v. California, No. CV 79-162 MRP (C.D. Cal. Sept. 21, 1979). *Id.* slip op. at 4. Three of the 12 Brethren schools in the first case are church owned and operated. No. CV 79-93 MRP, Complaint at 3. The other nine are comprised of two separate parent-owned communities of schools of four and five schools each. *Id.* at 3-4. The plaintiff schools in the second case are 85 Lutheran schools operated under the auspices of that denomination. Nos. CV 79-93, CV 79-162 MRP, slip op. at 4 (C.D. Cal. Sept. 21, 1979).

144. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 14 (C.D. Cal. Sept. 21, 1979).

145. *Id.* slip. op. at 15.

146. *Id.* slip. op. at 18.

147. *Id.* slip. op. at 8.

148. *Id.* slip. op. at 9-12.

149. *Id.* slip. op. at 12-14.

150. *See* Trinity Evangelical Lutheran Church v. Department of Indus. Relat., No. CV 78-500325 (Cir. Ct. Mobile County, Ala. Jan. 27, 1979); Roman Catholic Church v. Louisiana, No. 219,660 (19th Jud. Dist. Ct., East Baton Rouge Parish, La. Aug. 31, 1979); Frankford Friends School v. Joseph, No. 941 (Pa. Commw. Ct., filed Oct. 10, 1979); Germantown Friends School v. Joseph, No. 941 (Pa. Commw. Ct., filed Oct. 10, 1979); Independent Baptist Church v. Tennessee, No. 54227, (Ch. Ct. Hamilton County, Tenn. March 23, 1979) (unpublished opinion). *See* additional cases cited note 116 *supra*.

151. *See* Trinity Evangelical Lutheran Church v. Department of Indus. Relat., No. CV 78-500325 (Cir. Ct. Mobile County, Ala. Jan. 27, 1979); Roman Catholic Church v. Louisiana, No. 219,660 (19th Jud. Dist. Ct., East Baton Rouge Parish, La. Aug. 31, 1979); Independent Baptist Church v. Tennessee, No. 54227 (Ch. Ct. Hamilton County, Tenn. March 23, 1979) (unpublished opinion). *See* additional cases cited note 116 *supra*.

152. No. 54227 (Ch. Ct. Hamilton County, Tenn. March 23, 1979) (unpublished opinion). The schools involved in the case were all Baptist church schools primarily utilizing church facilities. *Id.* at 2.

153. *Id.* at 3-4.

tempt to tax them would constitute an infringement of their first amendment religious liberties.[154]

In an important recent development, the Secretary of Labor has initiated conformity proceedings[155] against six states on the basis of their refusal to extend the coverage of their state unemployment laws to church-related schools.[156] Despite the recommended decision of an administrative law judge[157] that coverage of the church schools is neither statutorily mandated[158] nor constitutionally permissible,[159] the Secretary has declared that two of the states, Alabama and Nevada, are not in conformity with FUTA.[160] This decision by the Secretary has been appealed to the United States Court of Appeals for the Fifth Circuit.[161] The four other states involved in the conformity proceedings, Michigan, Tennessee, Texas, and Washington, have consented to a postponement of the Secretary's determination of whether their unemployment statutes conform to FUTA.[162]

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154. *Id.* at 6-8. On the basis of the finding that the free exercise rights of the schools could be unconstitutionally infringed, the court granted an injunction against collection of the state tax. *Id.* at 9.

155. *See* Conformity Proceeding—Recommended Decision, *supra* note 117, at 2; Conformity Proceeding—Decision of the Secretary, *supra* note 50, at 1, 2.

156. Conformity Proceeding—Recommended Decision, *supra* note 117, at 1 & n.1.

157. Conformity Proceeding—Recommended Decision, *supra* note 117.

158. *Id.* at 7-9. With respect to the proper interpretation of FUTA, the judge made the following observations: 1) § 3309(b)(1), when read literally, exempts all employment in the service of "church," and looks to the religious nature of the employer, *not* to the nature of the employment, *id.* at 8; 2) the Department's reliance on language in the Senate Report accompanying the deletion of § 3309(b)(3) (that the deletion would cover 242,000 additional employees—a figure which corresponds to the Department's figure for the total number of employees in all nonprofit schools) was "misplaced" and a "slender thread" because "the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent" concerning such data, *id.*; 3) the deletion of § 3309(b)(3) was unaccompanied by any definitive language expressly indicating an intent to tax church schools, *id.*; and 4) the Department's definition of the term "church" is inconsistent with the meaning given to that term throughout the Internal Revenue Code. *Id.*

159. *Id.* at 7-8. The judge adopted in full the constitutional conclusions of the courts in three previous cases, each of which was decided in favor of the schools. *See id.* at 8, *citing* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP (C.D. Cal. Sept. 21, 1979); Trinity Evangelical Lutheran Church v. Department of Indus. Relat., No. CV 78-500325, (Cir. Ct. Mobile County, Ala. Jan. 27, 1979); Roman Catholic Church v. Louisiana, No. 219,660 (19th Jud. Dist. Ct., East Baton Rouge Parish, La. Aug. 31, 1979).

160. Conformity Proceeding—Decision of the Secretary, *supra* note 50, at 25.

161. Alabama v. Marshall, No. 79-3968 (5th Cir., docketed Dec. 11, 1979). The appeal process in the event of the noncertification of a state unemployment security law is set out in 42 U.S.C. § 504 (1976). Upon the unfavorable determination of the Secretary, the noncertified state has 60 days to file a petition for review in the federal court of appeals in which the state is located or in the Court of Appeals for the District of Columbia. *Id.* § 504(a). The statute provides for various stays of the Secretary's decision to withhold certification of the nonconforming state during the appeal process. *Id.* § 504(d). The judgment of the court of appeals, either affirming or setting aside the decision of the Secretary, is subject to review by the United States Supreme Court upon certiorari or certification. *Id.* § 504(c). Judicial proceedings under § 504 are entitled to a preference "and shall be heard and determined as expeditiously as possible" upon the request of the Secretary. *Id.* § 504(e).

162. Conformity Proceeding—Recommended Decision, *supra* note 117, at 1 & n.1.

III. A FRAMEWORK FOR RESOLVING THE CONFLICT

A. *Statutory Interpretation*

1. *Institutional Considerations*

The issue of whether Christian schools should be subject to the unemployment compensation laws involves both statutory[163] and constitutional dimensions.[164] The analysis of this comment will follow the traditional approach of the Supreme Court by first considering possible statutory grounds for resolving the conflict.[165]

In resolving the issue on statutory grounds, it is important to note that *all* nonprofit organizations, including Christian schools, are exempted from the *federal* unemployment tax by FUTA section 3306(c)(8).[166] Only the *states* are required by FUTA section 3309 to subject nonexempt, nonprofit organizations to the state unemployment laws.[167] Therefore, it is the *state* unemployment laws which must be challenged in the first instance by the aggrieved Christian schools since only the state laws tax or otherwise directly affect these schools.[168] However, since the federal-state unemployment system involves a four-tiered devolution of authority—from Congress to the Labor Department, to the state legislatures, and ultimately to the state employment security bureaus[169]—determining the validity of a particular state law provision may necessitate a separate inquiry at each of these four levels.

Particularly significant in the federal-state unemployment system is the role of the Department of Labor. Due to the effectiveness of the certification

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163. For a discussion of the statutory questions involved in bringing Christian schools within the unemployment compensation laws, *see* notes 166-252 and accompanying text *infra*.

164. For a discussion of the constitutional issues involved, *see* notes 310-69 and accompanying text *infra*.

165. *See* NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313, 1318 (1979); The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

166. I.R.C. § 3306(c) states in pertinent part: "For purposes of this chapter, the term 'employment' means any service performed . . . except—. . . (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)." *Id.*

167. I.R.C. § 3309(a). *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 2 n.6 (C.D. Cal. Sept. 21, 1979).

168. *See* I.R.C. § 3309(a).

169. For an overview of the federal-state unemployment compensation system, *see* notes 37-67 and accompanying text *supra*. The policy of bringing Christian schools within the state unemployment compensation programs evolved out of the following interdependent chain of events. First, without ever specifically mentioning church schools, Congress amended FUTA by deleting § 3309(b)(3). *See* notes 112-13 *supra*. Second, the Department of Labor interpreted the amendment as bringing church-related schools within FUTA's scope; thus, the Department directed the states to amend their statutes to reflect the change in FUTA and to interpret their statutes in accordance with the Department's interpretation. *See* notes 120-34 and accompanying text *supra*. Third, the state legislatures eliminated their school employment exemptions. *See* note 98 and accompanying text *supra*. Finally, the state employment security boards executed the law by levying unemployment taxes on church-related schools. *See* notes 124 & 127 and accompanying text *supra*.

process,[170] the states are not only compelled to adopt the substantive provisions of FUTA,[171] but also to interpret and apply those provisions in conformity with the directives of the Labor Department.[172] Therefore, insofar as Christian schools are challenging the state unemployment statutes as interpreted and applied to them, they are ultimately, albeit indirectly, challenging the Secretary of Labor's interpretation of FUTA.[173] If Christian schools are able to effect an invalidation or alteration of the Department's interpretation of section 3309 of FUTA, the certification process will tend to assure a resultant change in the interpretation and application of the state laws as applied to the schools.[174]

2. *The Section 3309(b)(1) Exception*

Since section 3309(a) of FUTA requires states to include all nonexempt, nonprofit organizations in the state unemployment compensation programs,[175] Christian schools, which fall within the definition of a nonprofit organization,[176] must demonstrate that they come within one of the specific exclusions provided in subsections (b) and (c) of section 3309[177] in order to be exempt from the state law coverage. Although the Department of Labor has issued a contrary determination,[178] it is submitted that the two catagories of section 3309(b)(1) of FUTA[179] may provide many Christian schools with such an exemption.

Subsection (A) of section 3309(b)(1) exempts all services performed in the employ of a church or an association of churches.[180] It is arguable that a substantial minority of Christian schools would qualify for the section

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170. For a discussion of the certification process, *see* notes 61-66 and accompanying text *supra*.

171. *See* note 67 and accompanying text *supra*.

172. *See* notes 67-70 & 124-27 and accompanying text *supra*. *See also* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip. op. at 6 (C.D. Cal. Sept. 21, 1979). The federal district court in *Grace Brethren* stated that "while initial participation in FUTA is voluntary, once a state has established an unemployment compensation program, it is compelled to conform its program to FUTA regulations as they may be amended from time to time." *Id.*

173. *See id.* For example, the court in *Grace Brethren* noted that California "cross-claimed against the Secretary of Labor requesting the court to countermand the Directive. In that cross-claim, the state alleges that it interprets § 3309(b) differently from the Secretary, and that it agrees with plaintiff's contention that employees of church schools should be exempt." *Id.* at 6-7.

174. For a discussion of how the certification process causes state laws to conform to FUTA, *see* notes 61-66 and accompanying text *supra*.

175. I.R.C. § 3309(a).

176. *Id.* § 3306(c)(8).

177. *Id.* § 3309(b), (c).

178. *See* Letter from Marshall, *supra* note 120. For the relevant portion of this opinion letter, *see* note 122 *supra*.

179. I.R.C. § 3309(b)(1)(A), (B). For the text of this provision, *see* text accompanying note 114 *supra*.

180. *Id.* § 3309(b)(1)(A); text accompanying note 114 *supra*.

3309(b)(1)(A) exception.[181] The provision would seem to require, however, that the school and the church not be separately incorporated[182] and that the teachers and administrators have employment contracts directly with the church.[183]

Subsection (B) of section 3309(b)(1) exempts services performed in the employ of an organization which is 1) operated primarily for religious purposes; and 2) operated, controlled, or principally supported by a church or convention or association of churches.[184] It is submitted that the average Christian school would have little difficulty meeting the express requirements of the first element of the section 3309(b)(1)(B) test. Although a Christian school has a dual purpose—to inculcate religious precepts and impart temporal knowledge[185]—the religious purpose is deemed by the schools to be preeminent, pervasive, and all-encompassing.[186] Moreover, the Supreme Court has consistently characterized church schools as being operated primarily for religious purposes.[187] Nevertheless, it should be noted that the Labor Department has tended to dichotomize the religious and secular aspects of the education in church schools, reasoning that since the majority of the instructional time in the schools is devoted to secular subjects, it cannot follow that the schools have a primarily religious purpose.[188]

In considering the second element of this exception, it should be noted that Congress apparently considered separate incorporation of the subject organization as a factor strongly tending to negate the existence of the requisite degree of church control.[189] Therefore, an application of the second

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181. *See* notes 25-28 and accompanying text *supra*. A federal district court recently found two groups of Lutheran and independent Christian schools to be exempt from unemployment compensation taxation under FUTA section 3309(b)(1)(A), and the section's state law counterpart. *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 7-9 (C.D. Cal. Sept. 21, 1979). For a discussion of *Grace Brethren*, *see* notes 143-49 and accompanying text *supra*.

182. *See* Grace Brethren Church v. California, Nos. 79-93 MRP, CV 79-162 MRP, slip op. at 7-9 (C.D. Cal. Sept. 21, 1979).

183. *See id.*

184. *See* I.R.C. § 3309(b)(1)(B); text accompanying note 114 *supra*.

185. *See generally* McCormick v. Hirsch, 460 F. Supp. 1337, 1352-53 (M.D. Pa. 1978); State v. Whisner, 47 Ohio St. 2d 181, 199-200, 351 N.E.2d 750, 761-62 (1976). *See also* Grace Brethren Church v. California, No. CV 79-93 MRP, Complaint at 6-7 (C.D. Cal. Sept. 21, 1979).

186. *See* sources cited note 185 *supra*.

187. *See* Meek v. Pittenger, 421 U.S. 349, 365-66 (1975); Lemon v. Kurtzman, 403 U.S. 602, 613-18 (1971). The Court in *Meek* stated:

> The church-related elementary and secondary schools that are the primary beneficiaries of . . . [the Act] typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.

421 U.S. at 366 (citation omitted).

188. *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 8 (C.D. Cal. Sept. 21, 1979).

189. *See* S. REP. NO. 752, 91st Cong., 2d Sess. 48, 49 (1970). For the text of this legislative history, *see* note 115 *supra*. Congress apparently intended to exclude organizations under this

element of the section 3309(b)(1)(B) test necessitates that a distinction be drawn between types of Christian schools based upon their organizational structure.[190] Church owned and operated Christian schools[191] would appear to pass this element of the test, since many of them are conducted on church property,[192] administered by church officials,[193] predominantly supported by church funds,[194] and not separately incorporated.[195] In addition, schools that require teachers to be members of the parent church often consider teachers to be officers of the church ministering in Christian education.[196] On the other hand, parent owned and operated schools[197] would not readily fall within this element of the test, since they are not directly

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provision that meet both the "primary purpose" test and the "control" test. S. REP. NO. 752, 91st Cong., 2d Sess. 48, 49 (1970). Congress further indicated that if an organization, such as a college, orphanage, or retirement home, is incorporated separately from the church, a strong affiliation or relation to the church may not be sufficient to bring the organization within the 3309(b)(1)(B) exemption. *Id.*

190. The Attorney General of Michigan recently issued an opinion finding that, under Michigan's counterpart to § 3309(b)(1)(B) of FUTA, schools operated by a church, but not other separately incorporated religious schools, were excluded from mandatory participation in Michigan's unemployment compensation programs. Opinion of the Attorney General of Michigan, No. 5434 (January 19, 1979). *See* text accompanying notes 115-17 *supra*. Michigan's attorney general stated with respect to *church-operated* schools:

> If the elementary or secondary school is operated by the church, convention or association of churches, or an organization of any of them, through its Bishop, pastor, representative or representatives and has no separate legal identity, I am constrained to conclude that such a person was not in the employ of a school and his employment is not subject to the provisions of [Michigan's unemployment compensation statute].

Opinion of the Attorney General of Michigan, No. 5434 (January 19, 1979). Regarding separately incorporated or parent-owned religious schools, the Attorney General of Michigan opined: "[I]f such a person is in the employ of a religiously-oriented school which has a separate legal existence apart from the organizations listed in [Michigan's unemployment statute corresponding to I.R.C. § 3309(b)(1)], then it is my opinion that the exclusion found [therein] is inapplicable." Opinion of the Attorney General of Michigan, No. 5434 (January 19, 1979).

191. One observer has written: "Indeed, the phrase 'Christian schools' encompasses institutions as diverse as one-room Calvinist schools with 15 to 20 students; fundamentalist Baptist schools that meet in church basements; nondenominational, four-campus complexes, and just about any variation in between." THE NAT'L OBSERVER, Jan. 15, 1977, at 1. *See also* U.S. NEWS & WORLD REPORT, Oct. 8, 1973, at 45, 46.

192. *See* sources cited note 191 *supra*.

193. *See* sources cited note 191 *supra*. *See also* The Philadelphia Bulletin, July 9, 1978, at 1, col. 2.

194. *See* sources cited note 193 *supra*. With respect to Lutheran and parochial schools, one article stated: "Missouri Synod officials estimated payment of the [unemployment compensation] tax will cost their congregations some $3 million while Roman Catholics could pay as much as $15 million." The Philadelphia Bulletin, July 9, 1978, at 8, col. 1.

195. *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 8 (C.D. Cal. Sept. 21, 1979).

196. *Unemployment Insurance Coverage of Teachers in Christian Schools*, Memorandum of Law submitted by Attorneys W. Ball and P. Muren to the Unemployment Insurance Division of the New York Department of Labor, at 7-8. (1979) [hereinafter cited as N.Y. Christian School Memorandum].

197. For a discussion of parent owned and operated Christian schools, *see* note 26 and accompanying text *supra*.

associated with any one local church[198] and are usually separately incorporated.[199]

Should either or both types of Christian schools described herein be successful in arguing that they fall within FUTA's section 3309(b)(1)(B) exemption, there would be at last two important consequences for the schools. First, since the state laws have exclusionary provisions worded and interpreted consistently with FUTA section 3309(b)(1)(B),[200] a determination that Christian schools are excluded by that section would likely result in a concomitant tax exemption for Christian schools under the state law counterparts to section 3309(b)(1)(B). Second, should only *separately incorporated* Christian schools be denied exemption under section 3309(b)(1)(B), they may be able to argue successfully that it is unconstitutional to distinguish between Christian schools in order to tax some and exempt others, solely on the basis of differing religious organizational structures.[201]

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198. *See* note 26 and accompanying text *supra*. Nevertheless, it could be argued that under a broader reading of "church," the parents who own, control, and principally support a Christian school constitute a "church." While the parents involved in Christian schools may not all be members of the same local congregation of worshippers, they tend to share common religious goals and ideals, meet regularly, and engage corporately in worship and other religious activities. *See* note 26 and accompanying text *supra*. Without labelling themselves a "church" then, the parents of many parent owned Christian schools manifest in the course of their school-related activities many of the traditional characteristics of a conventional church. While the Supreme Court has broadened the constitutional scope of the term "religion," *see* Welsh v. United States, 398 U.S. 33 (1970); United States v. Seeger, 380 U.S. 163 (1965), the Court has not yet attempted to define a "church." However, in light of the Supreme Court's broad definition of "religion," and the Internal Revenue Code's expansive concept of what constitutes a "church," there would seem to be some merit to the argument that the parents of a parent owned and operated Christian school constitute a "church." *See* I.R.C. §§ 501(c)(3), 3306(c)(8), 3309(a)(1)(A). Moreover, based on the wide spectrum of beliefs which may constitute a "religion," it would seem anomolous that, in order to afford certain organizations special tax treatment, Congress could discriminate on the basis of time, frequency, place, and manner of various modes of *exercising* religious beliefs. Although Congress may constitutionally authorize the Internal Revenue Service to revoke a religious organization's tax exempt status because the organization is not primarily engaged in religious activities, *see* Parker v. C.I.R., 365 F.2d 792 (8th Cir. 1966), the cases are in agreement that Christian schools *are* primarily engaged in religious activities. *See, e.g.*, Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 10-12 (C.D. Cal. Sept. 21, 1979); State v. Whisner, 47 Ohio St. 2d 181, 187-90, 199-200, 351 N.E.2d 750, 754-57, 761-62 (1976); Independent Baptist Church v. Tennessee, No. 54227, slip op. at 2-6, 8 (Ch. Ct. Hamilton County, Tenn. March 23, 1979) (unpublished opinion). *See also* notes 137-54 and accompanying text *supra*.

199. *See* note 26 and accompanying text *supra*.

200. *See* notes 126-28 and accompanying text *supra*.

201. It may be posited for purposes of this discussion that separately incorporated Christian schools are no less religious in their beliefs, teachings, or practices, and are no less an integral part of the religious mission of the Christian faith, than their church-school counterparts. Given this assumption, the argument of separately incorporated Christian schools that the unemployment compensation laws are unconstitutional as applied to them would be based on the proposition that, under the religion clauses of the first amendment, the government cannot bestow a benefit or impose a burden which differentiates between two otherwise identical Christian schools simply because one is tied to the hierarchical structure of the local church and the other is not. This kind of liability-determinative classification, it could be argued, constitutes governmental discrimination based on the *form* of worship. The Supreme Court has stated in Cantwell v. Connecticut, 310 U.S. 293 (1940), that "freedom to adhere to such religious *organi-*

3. *Lack of Express Congressional Intent: The* Catholic Bishop of Chicago *Test*

Buttressing the foregoing analysis, that section 3309(b)(1) of FUTA provides unemployment tax exemptions for Christian schools, is the fact that Congress, in deleting the original section 3309(b)(3) from FUTA in 1976,[202] expressed no *specific* intent to require states to tax Christian schools. Lack of such specific intent is important in two respects. First, the Labor Depart-

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zation or *form of worship* as the individual may choose cannot be restricted by law. . . . The Religion Clauses safeguar[d] the free exercise of the chosen form of worship." *Id.* at 303-04 (emphasis added). In Abington School Dist. v. Schempp, 374 U.S. 203 (1962), the Court insisted that "the Free Exercise Clause . . . recognizes the value of religious training, *teaching*, and observance, and, more particularly, the right of every person to *freely choose his own course with reference thereto*, free from any compulsion from the state." *Id.* at 222 (emphasis added).

The due process and equal protection clauses of the fourteenth and fifth amendments may supplement and provide support for this analysis. One federal court recently summarized the Supreme Court's closely related analyses under these clauses as follows:

> The legislation in question can be examined to determine whether its classifying distinctions lack any reasonable relationship to achieve any legitimate purpose (equal protection), or it can be examined to determine whether it unreasonably and unjustifiably transgresses the fundamental restrictions on the power of government to intrude upon individual rights and liberty (substantive due process). Under either analysis, it is the adoption of irrational legislative means to achieve asserted goals that violate [*sic*] the constitutional guarantee.

Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075, 1080 (M.D. Fla. 1978). *See generally* Zablocki v. Redhail, 434 U.S. 374, 399-403 (1978) (Powell, J., concurring in the judgment); Moore v. East Cleveland, 431 U.S. 494, 500-03 & n.10 (1977); Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975). The *Patch Enterprises* court also provided a good summary of the equal protection law which could be used to support the contentions of the separately incorporated Christian schools:

> Any form of the state legislation creating discriminatory classifications (1) that concerns fundamental constitutional rights, or (2) whose defining criteria are inherently suspect, or (3) that are unnecessarily restrictive and unreasonably related to the legislation's purported purpose, is subject to challenge and examination as a denial of equal protection of the laws. . . . The standard of the equal protection clause is whether a particular legislative decision *unreasonably discriminates* either in its definition of a class, in its treatment of fundamental rights, or in its choice of means to accomplish an intended objective.

447 F. Supp. at 1078-79 (citations omitted) (emphasis added). Under these principles, the separately incorporated Christian schools would argue that 1) the federal-state unemployment compensation system has created a discriminatory classification based upon the constitutionally protected right of freedom to choose one's own *organization or form of worship* described by the *Cantwell* Court; 2) this liability-determinitive classification is not rationally related to the legitimate governmental goals associated with the unemployment laws, *see* notes 53-55 and accompanying text *supra* and notes 352-55 and accompanying text *infra*; and 3) there is no rational basis for depriving one religious school of its liberty and property while at the same time exempting another from such deprivation solely because of structural and formal considerations.

For another constitutional argument which could be asserted by the separately incorporated Christian schools (an argument based upon their first amendment free exercise rights), *see* notes 254-369 and accompanying text *infra*.

202. Employment Security Amendments of 1970, Pub. L. No. 91-373, § 104(b)(1), 84 Stat. 698. In 1976, Congress replaced the original § 3309(b)(3) with a new, unrelated provision. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2670. Regarding the 1976 FUTA amendments which deleted § 3309(b)(3), *see* notes 108-13 and accompanying text *supra*.

ment's directive to the states to bring all Christian schools within the state unemployment laws was expressly based on the Department's determination that Congress, in deleting the original section 3309(b)(3), had specifically intended such a result.[203] If such specific intent does not exist, the Labor Department's directive may be invalid as being outside the scope of congressional authorization.[204]

Second, a recent Supreme Court decision, *NLRB v. Catholic Bishop of Chicago*,[205] indicates that an administrative agency may not engage in activities which tend to jeopardize the religious freedoms of an organization unless the agency's conduct is authorized by a clear expression of an affirmative congressional intent.[206] In *Catholic Bishop of Chicago*, the National Labor Relations Board (NLRB) attempted to assert jurisdiction over two groups of parochial schools which refused to recognize or bargain with their respective lay teachers' unions.[207] After determining that the NLRB's "relatively recent" assertion of jurisdiction over religious schools[208] would present a significant risk of infringement upon their first amendment rights,[209] the Court stated that the NLRB's jurisdiction would be upheld only if there existed a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act."[210] Since such congressional intent was not found by the Court,[211] it

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203. *See* notes 122-25 and accompanying text *supra*.

204. *See also* notes 205-12 and accompanying text *infra*.

205. 99 S. Ct. 1313 (1979).

206. *Id.* at 1319, 1322. For a discussion of the *Catholic Bishop of Chicago* test, *see* notes 208-12 and accompanying text *infra*.

207. 99 S. Ct. at 1314-15. One group of schools, operating as "minor seminaries," admitted primarily potential priests; the other group had no special admissions criteria and offered secular courses. *Id.* at 1314-15. Parochial lay teachers' unions filed charges of unfair labor practices with the NLRB, primarily as a result of actual or threatened teacher layoffs for violation of the schools' religious standards. *Id.* at 1320. In responding to these charges, the schools asserted that their actions were taken in accordance with their religious beliefs. *Id.*

208. *Id.* at 1317.

209. *Id.* at 1320, 1322. Writing for the majority, Chief Justice Burger observed that in resolving the conflict between the unions and the schools, the NLRB would be forced to inquire into "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 1320. After holding that both the conclusions of the investigations and the very process of inquiry posed potential free exercise violations, the Court stated: "We see no escape from conflicts flowing from the Board's exercise of jurisdiction over church-operated schools and the consequent serious First Amendment questions that would follow." *Id.*

210. *Id.* at 1320-21. Chief Justice Burger determined at the outset of his analysis that the case would be decided on statutory, not constitutional grounds, in order to "hee[d] the essence of Chief Justice Marshall's admonition . . . that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *Id.* at 1318, *citing* The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

211. 99 S. Ct. at 1320-21. The majority of the Court determined that, despite the broad scope of authority delegated to the NLRB, "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Id.* In a dissenting opinion, Justice Brennan, joined by Justices White, Marshall, and Blackmun, argued that the exemption for church-related schools found to exist by the majority had been specifically considered by Congress and rejected. *Id.* at 1324-28 (Brennan, J., dissenting). The dissent noted that the Supreme Court had earlier stated: "This court has consistently declared

held that the NLRB did not have jurisdiction over these parochial schools.[212]

It is submitted that the numerous factual and analytical similarities between the NLRB's assertion of jurisdiction over parochial schools and the unemployment compensation taxation of Christian schools suggest that the rationale developed in *Catholic Bishop of Chicago* will prove to be important precedent in future litigation involving Christian schools. Both situations involve a determination made by a federal agency, in the absence of a clear congressional mandate, to extend the coverage of a federal statute to previously exempt church-related schools.[213] The competing interests are similar in both cases: the government's interest in maximizing the beneficial impact of social legislation[214] and the employees' interest in safeguarding their economic welfare are balanced against the desire on the part of the school administrators for religious and economic autonomy. Finally, the types of free exercise problems created by the subjection of the church schools to the statutes tend to closely parallel each other.[215]

Therefore, in applying the *Catholic Bishop of Chicago* analysis to the controversy between Christian schools and state unemployment agencies,

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that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *Id.* at 1327 (Brennan, J., dissenting) (citations omitted) (emphasis supplied by the dissent). The dissent further noted that the courts had previously upheld the NLRB's jurisdiction over nonprofit and even religious institutions. *Id.* at 1325 & n.4, 1327 (Brennan, J., dissenting).

212. *Id.* at 1322.

213. Regarding the lack of statutory authorization given to the NLRB to exercise jurisdiction over parochial schools, *see* note 211 *supra*. There is a corresponding lack of legislative intent to subject church schools to unemployment compensation taxes. *See* notes 108-19 & 123 and accompanying text *supra*.

214. Chief Justice Burger recognized that "[i]n enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively." 99 S. Ct. at 1321. For a discussion of the generally positive effect of unemployment compensation legislation on the American work force, *see* note 56 and accompanying text *supra*.

215. For example, "good faith" proceedings, discussed in the parochial school-NLRB cases, and "good cause" determinations, presently being contested by Christian schools in the unemployment compensation coverage cases, both involve similar instances of governmental oversight in evaluating the reasons for employee termination and both impose similar types of burdens on the activities of church-related schools.

"Good faith" proceedings are formal determinations made by the NLRB in the context of charges of unfair labor practices as to whether certain actions constitute firing for cause. *See* 29 U.S.C. §§ 158(a), 160(c) (1976). The object of the proceeding is to assure that an employee was terminated for violating a legitimate employment standard and not for exercising any of his rights under the NLRA. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1113, 1125 (7th Cir. 1977), *aff'd on other grounds*, 99 S. Ct. 1313 (1979). Regarding the determinations which the NLRB would have made as to the "good faith" of the parochial school administrator's decision to fire teachers for violating religious doctrines, the Seventh Circuit noted: "The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge." 559 F.2d at 1125. The Supreme Court in *Catholic Bishop of Chicago* determined that "good cause" proceedings presented a "significant risk" of infringing the first amendment rights of parochial schools. 99 S. Ct. at 1324.

Like "good faith" determinations, "good cause" proceedings under unemployment compensation laws involve governmental oversight of the reasons for employee termination. Instead of

the first inquiry is whether the activities of the agencies "presen[t] a significant risk that the First Amendment will be infringed."[216] The *Catholic Bishop of Chicago* Court indicated that it would consider two factors in determining whether a school's religious freedoms had been infringed: 1) whether the school may be characterized as sufficiently "religious" to warrant first amendment protection;[217] and 2) whether the exercise of the school's religious mission would be burdened as a result of the administrative action.[218]

In considering the first factor, it is submitted that Christian schools typically meet the Court's criteria for religiosity[219] in that they integrate the precepts of the Bible into all of their academic curriculum,[220] maintain high religious standards for faculty members,[221] and require students to participate in religious courses and activities on a regular basis.[222]

With respect to the Court's second factor,[223] it is submitted that there are several substantial burdens imposed on the religious activities of church schools under the unemployment compensation laws.[224] In addition to being burdened by a tax liability[225] and by an obligation to submit extensive records to the government,[226] Christian schools may experience a substantial burden from having to take part in "good cause litigation."[227] Because

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being conducted by the NLRB in the context of unfair labor practice charges, "good cause" proceedings are conducted by state employment security boards whenever an idled worker seeking unemployment compensation benefits and his ex-employer disagree over whether the grounds for the worker's termination of employment come within the statutory definition of "good cause." *See* notes 101-07 and accompanying text *supra*. The federal court in Grace Brethren Church v. California found "good cause" proceedings to be similar to the "good faith" proceedings in *Catholic Bishop of Chicago*, and equally likely to cause unconstitutional entanglement between church and state. *See* notes 343 & 369 and accompanying text *infra*. For a discussion of *Grace Brethren*, *see* notes 143-49 and accompanying text *supra*.

216. 99 S. Ct. at 1320.

217. *Id.* at 1319.

218. *Id.* at 1320.

219. *Id.* at 1319.

220. *See* notes 27-28 and accompanying text *supra*.

221. *See* notes 228-29 and accompanying text *infra*.

222. *See* P. KIENEL, *supra* note 20, at 71-76; P. KIENEL, *supra* note 29, at 125-43.

223. *See* text accompanying note 218 *supra*.

224. For an extended discussion of the burdens that unemployment compensation laws place on Christian schools, *see* notes 318-48 and accompanying text *infra*.

225. For a discussion of the types of unemployment compensation tax liability to which Christian schools may be subject, *see* notes 72-87 and accompanying text *supra*. Regarding the burdening effect the taxes will have on the free exercise rights of Christian schools, *see* notes 318-33 and accompanying text *infra*.

226. For a discussion of the recordkeeping requirements imposed by the unemployment compensation laws, *see* notes 88-95 and accompanying text *supra*. Regarding the inhibiting effect which these recordkeeping requirements have on the free exercise rights of Christian schools, *see* notes 334-39 and accompanying text *infra*.

227. Concerning the tendency of the unemployment compensation laws to precipitate "good cause" litigation, *see* notes 101-07 & 215 and accompanying text *supra*. For a discussion of the burdens which "good cause" determinations will have on the religious mission of Christian schools, *see* notes 340-43 and accompanying text *infra*.

employees in Christian schools are hired partially on the basis of moral and religious qualifications,[228] and may be fired for violating the school's religious standards,[229] such agency determinations will necessarily involve governmental oversight of the reasons for a church school administrator's decision to fire an employee on religious grounds.[230]

It is submitted that a consideration of these two factors supports the conclusion that, under the first inquiry of *Catholic Bishop of Chicago*, there is a substantial risk that application of the unemployment compensation laws to Christian schools will infringe upon their first amendment rights. Having reached this conclusion, *Catholic Bishop of Chicago* requires a second inquiry: whether there exists any clear expression of an affirmative intention by Congress that teachers in church-operated schools should be covered by the unemployment compensation laws.[231]

In determining whether the requisite congressional intent exists, it is significant that neither FUTA nor its legislative history makes any specific, express reference to church-related or religious schools.[232] Since the 1976 amendment to FUTA simply deleted the prior exclusion for elementary and secondary schools,[233] it is obviously mute on the issue of FUTA's applicability to church-related schools. The Senate Report which accompanied the

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228. *See* THE NAT'L OBSERVER, Jan. 15, 1977, at 18, cols. 1, 2. *See also* N.Y. Christian School Memorandum, *supra* note 196, at 1-3, 6-8. In a case involving state accreditation of Christian schools, a North Carolina court stated: "[T]he defendant schools require that a person, to be employed as a teacher therein, be a born again Christian of the fundamentalist Christian faith and reflect Christian attitudes and values in his or her conduct both on the school premises and in his or her personal life." North Carolina v. Columbus Christian Academy, No. 78 CVS 1678, slip op. at 13 (Super. Ct. Div., Wake County, N.C. Sept. 1, 1978).

229. *See* sources cited note 228 *supra*. In a memorandum to the New York Department of Labor, attorneys for the New York Association of Christian Schools wrote: "In safeguarding the integrity of the religious mission with which he is entrusted, a pastor must exercise the responsibility of discharging teachers, and others, for religious or moral behavior which might, or might not, meet the secular standard of 'misconduct' . . . ." N.Y. Christian School Memorandum, *supra* note 196, at 14.

230. The court in *Grace Brethren* stated:

> [D]isputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church. The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in *Catholic Bishop*.

Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 12 (C.D. Cal. Sept. 21, 1979).

231. 99 S Ct. at 1320, 1321. *See* notes 210-12 and accompanying text *supra*.

232. A major impetus for eliminating the exemption in FUTA for school-related employment was the concern expressed at the congressional hearings by national teachers' unions regarding the rapidly increasing level of unemployment in the *public* schools. *See* notes 110-12 and accompanying text *supra*. No testimony was given at those hearings regarding any comparable decrease in employment in *religious* schools. *See* sources cited note 111 *supra*. To the contrary, the fact that Christian schools have rapidly increased in size and number in recent years, *see* notes 20-24 and accompanying text *supra*, would indicate that employment opportunities are expanding in church-related schools.

233. For a discussion of the 1976 amendment to § 3309 of FUTA, *see* notes 108-13 and accompanying text *supra*.

amendment[234] does little more than articulate the logical conclusion to be deduced from the deletion of section 3309(b)(3): "The committee bill would repeal this exclusion, thus requiring coverage for [nonprofit elementary and secondary] schools on the same basis as it is required for other nonprofit entities."[235]

It is submitted that the language and history of section 3309 of FUTA provide insight into the meaning of the quoted Senate language. Nonprofit organizations, including all "religious, charitable [or] educational organization[s],"[236] have always been excluded from the *federal* unemployment tax.[237] In addition, FUTA did not require the *states* to include nonprofit organizations within the state unemployment laws until 1970.[238] In 1970, Congress enacted FUTA section 3309, requiring state unemployment compensation coverage of all nonprofit organizations except for those which were specifically excluded thereunder—such as certain church-related and educational organizations[239]—and all nonprofit organizations with fewer than four employees.[240] The 1976 amendment deleting section 3309(b)(3) evidences a clear congressional intent to require states to tax all nonprofit elementary and secondary schools *which looked solely to that section for exclusion,* including all public and many private schools.[241] It is submitted, however, that Congress did not intend to require state taxation of nonprofit schools which had alternate grounds for exclusion besides being a primary or secondary educational institution.

For instance, prior to the 1976 amendments, some Christian schools might have been excluded from FUTA because they fit within all three of the following categories: 1) a school under section 3309(b)(3); 2) a church-related organization under section 3309(b)(1); and 3) an organization having fewer than four employees under section 3309(c). It is clear that Christian schools with fewer than four employees are *still* excluded by section 3309(c),[242] even though an expansive reading of the above-quoted Senate

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234. For a discussion of the Senate Report accompanying the 1976 amendments to FUTA, *see* note 113 and accompanying text *supra.*

235. S. REP. NO. 1265, 94th Cong., 2d Sess. 10, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6006.

236. *See* I.R.C. § 3306(c)(8).

237. The original FUTA contained a very similar provision exempting nonprofit organizations. Int. Rev. Code of 1939, § 1426(b)(8), 53 Stat. 178 (now I.R.C. § 3306(c)(8)).

238. *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 2 & n.6 (C.D. Cal. Sept. 21, 1979).

239. *See generally* notes 108-19 and accompanying text *supra.*

240. I.R.C. § 3309(c).

241. For the relevant text of the Senate Report construing the 1976 amendment, *see* note 113 *supra.*

242. Nonprofit organizations employing fewer than four employees are exempted by § 3309(c) which provides in pertinent part: "This section shall not apply to service performed . . . in the employ of any [nonprofit] organization unless . . . the total number of individuals who were employed by such organization . . . was 4 or more." I.R.C. § 3309(c).

Report which speaks of nonprofit schools *in general*,[243] would indicate a congressional intent to tax all nonprofit schools, regardless of the size of their staff. Just as the deletion of section 3309(b)(3) had no effect on the existing 3309(c) exception, it is submitted that the deletion of 3309(b)(3) had no effect on the 3309(b)(1) "church" exception. It is further suggested that Congress may have considered church-related schools to be independently excluded by section 3309(b)(1) and, thus, unaffected by the deletion of 3309(b)(3).

Therefore, since Congress made no specific, express reference to church-related schools when deleting section 3309(b)(3), and since there is a substantial argument that church-related schools are independently excluded from mandatory state unemployment compensation coverage by section 3309(b)(1),[244] the required "clear expression of an affirmative intention of Congress" that church-related schools should pay state unemployment taxes appears to be lacking in the FUTA legislation.

This conclusion is buttressed by comparing the expression of congressional intent in deleting section 3309(b)(3) of FUTA with that involved in the National Labor Relations Act (NLRA) before the Court in *Catholic Bishop of Chicago*. Unlike FUTA, the NLRA had never exempted nonprofit organizations generally from its coverage.[245] Although the NLRB and the courts always assumed that the NLRB had jurisdiction over church schools,[246] the NLRB, in an exercise of its discretion, simply chose not to assert its jurisdiction.[247] Then, as the result of an administrative finding that parochial schools were increasingly affecting interstate commerce,[248] the NLRB determined to exert jurisdiction over the schools.[249] Although parochial schools technically came within the NLRA's definition of "employer,"[250] and although the NLRA contained no provision which even arguably excluded such schools,[251] the Court nevertheless enjoined the NLRB from exercising jurisdiction over parochial schools because Congress had not *clearly* expressed an *affirmative* intent to attain such a result.[252] It is submitted, therefore, that the congressional intent to subject church-related schools to un-

243. For the pertinent part of this Senate Report, *see* note 113 *supra*.

244. *See* notes 175-201 and accompanying text *supra*.

245. 99 S. Ct. at 1324 (Brennan, J., dissenting). A provision exempting nonprofit hospitals was enacted in 1947 but deleted soon thereafter. *Id.* at 1325 (Brennan, J., dissenting).

246. *Id.* at 1325 (Brennan, J., dissenting).

247. *Id.* at 1325-26 & n.6 (Brennan, J., dissenting). This interpretation of the NLRB's jurisdiction is corroborated by the fact that Congress specifically considered and rejected a proposed amendment to the NLRA which would have excluded nonprofit organizations. *See id.* at 1325 & n.5 (Brennan, J., dissenting).

248. *Id.* at 1317, 1325-26 & n.6 (Brennan, J., dissenting). *See* Cornell University, 183 N.L.R.B. 329 (1970).

249. *See* Cornell University, 183 N.L.R.B. 329 (1970). Regarding the NLRB's requirements for exerting jurisdiction over parochial schools, *see* 29 C.F.R. § 103.1 (1979).

250. *See* 29 U.S.C. § 152(2) (1976); 99 S. Ct. at 1324 (Brennan, J., dissenting).

251. *See* 99 S. Ct. at 1324 (Brennan, J., dissenting).

252. *Id.* at 1322 (Brennan, J., dissenting).

employment taxation is even less manifest than it was to bring parochial schools within the jurisdiction of the NLRB.

Insofar as application of the state unemployment compensation laws to Christian schools threatens to infringe upon the first amendment free exercise rights of these schools, and insofar as there is apparently no clear expression of an affirmative congressional intent to bring these schools under the unemployment laws, it is submitted that the *Catholic Bishop of Chicago* analysis indicates that the Labor Department's directive requiring state unemployment compensation coverage of church schools is invalid.[253]

B. *Constitutional Grounds*

1. *Free Exercise—A Framework of Analysis*

In considering the constitutionality[254] of subjecting Christian schools to the unemployment compensation laws, it is suggested that a framework for

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253. While invalidation of the Labor Department's directive would tend to cause the states to voluntarily reinstate their prior exemptions for church-related schools, it is suggested that, applying the *Catholic Bishop of Chicago* test on the state level, no state employment security agency may validly exercise jurisdiction over church-related schools unless the state legislature expressly authorizes such action. For a discussion of the elements of the *Catholic Bishop of Chicago* test, *see* notes 205-12, 216-18 & 231 and accompanying text *supra*. In a memorandum to the New York Department of Labor, attorneys for the New York Association of Christian Schools suggested a dual federal-state application of the *Catholic Bishop of Chicago* test to invalidate the application of the unemployment compensation laws to Christian schools: "[N]either the Congress nor the New York legislature gave a 'clear expression of an affirmative intention' to include teachers in church-operated schools under unemployment compensation coverage." N.Y. Christian School Memorandum, *supra* note 196, at 24.

It appears that some state employment agencies are reconsidering their posture toward church schools in the light of *Catholic Bishop of Chicago*. Recently, the Commissioner of Tennessee's Department of Employment Security informed the United States Secretary of Labor that, based on the Supreme Court's analysis in *Catholic Bishop of Chicago*, church schools in Tennessee were not deemed by the state to come within the provisions of the Act. Commissioner Bible stated in part:

> [I]n view of the recent United States Supreme Court decision in the case of *National Labor Relations Board vs. the Catholic Bishop of Chicago, et al* . . . and the interpretation of cases cited therein, it is the opinion of the Tennessee Department of Employment Security that persons employed by a church, convention or association of churches, or an organization operated primarily for religious purposes are excluded from coverage under the Tennessee Employment Security Act. . . . Thus, if a primary or secondary school is operated by a church, convention or association of churches, or an organization operated primarily for religious purposes, and exhibits substantial religious activity and purpose, we conclude that a person in the employ of such a church-related school is subject to the exclusion . . . .

Letter from Robert T. Bible, Commissioner, Department of Employment Security of the State of Tennessee, to the Honorable Ray Marshall, United States Secretary of Labor (April 12, 1979).

In addition, California has expressly indicated that it disagrees with the interpretation given to FUTA § 3309 by the Department of Labor and has sided with Christian schools in litigation to invalidate the tax. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 6, 7 (M.D. Cal. Sept. 21, 1979).

254. For the text of the first amendment provisions applicable to the following discussion, *see* note 1 *supra*.

analysis may be fashioned from the Supreme Court's reasoning in *Wisconsin v. Yoder*[255] taken in conjunction with prior cases which 1) distinguished between direct and indirect burdens on religious practices;[256] 2) focused on governmental "entanglement" with religion;[257] and 3) dealt with the NLRB's assertion of jurisdiction over Catholic schools.[258]

In *Yoder*, the Supreme Court was faced with the issue of whether Wisconsin's compulsory school-attendance law unconstitutionally infringed upon the rights of Amish parents to abide by their religious tradition of replacing their children's formal high school education with informal, home-centered education.[259] In holding that the law violated the free exercise rights of the Amish parents,[260] the Court structured its analysis around a three-tiered inquiry:[261] 1) whether the activity interfered with by the government is motivated by and rooted in a legitimate and sincerely held religious belief;[262] 2) whether and to what extent the organization's religious free exercise rights are being burdened or inhibited;[263] and 3) whether the governmental in-

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255. 406 U.S. 205 (1972). For a discussion of *Yoder*, *see* notes 259-70, & 279-92 and accompanying text *infra*.

256. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961). For a discussion of these "direct-indirect burden" cases, *see* notes 271-80 and accompanying text *infra*.

257. *See, e.g.*, Walz v. Tax Comm'n, 374 U.S. 664 (1970); NLRB v. Catholic Bishop of Chicago, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 99 S. Ct. 1313 (1979). For a discussion of the "excessive entanglement" factor, *see* notes 292-96 and accompanying text *infra*.

258. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 99 S. Ct. 1313 (1979); McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978); Caulfield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. 1977). For a discussion of the parochial school labor cases, *see* notes 297-308 and accompanying text *infra*.

259. 406 U.S. at 207. The defendants had been fined five dollars each for violating the compulsory-attendance law. *Id.* at 208. The defendants believed that in sending their children to high school they would be subjecting themselves to the censure of the Amish community, weakening the Amish community, and ultimately endangering the salvation of their own souls and those of their children. *Id.* at 209.

260. *Id.* at 234.

261. The three-tiered inquiry in *Yoder* was not designated as a "test" by the Court. The Supreme Court has never articulated a broadly applicable free exercise clause test or standard for determining when governmental infringements of religious liberties violate the Constitution. *See* Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3169 (E.D. Pa. 1977). The cases arising under the free exercise clause tend to be treated as unique, resulting in constitutional analysis that is tailored to the special factual situations confronting the Court. *Id.* This approach is contrary to the Court's approach in establishment clause cases, where a well-defined, broadly applicable test has been enunciated. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 235-36 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612, 613 (1971). However, due to the factual and analytical similarities between *Yoder* and the Christian school unemployment compensation cases, it is submitted that the Court would tend to follow the same approach in the Christian school cases as it did in *Yoder*. The federal court in *Caulfield* stated that in *Yoder*, "the Supreme Court has fashioned a loose analytical framework to guide the lower courts. That model will be followed here, insofar as possible." 95 L.R.R.M. at 3171. The existence of this framework was also noted in Comment, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 PA. L. REV. 631, 641 (1978).

262. 406 U.S. at 215-16.

263. *Id.* at 217-19.

terests in regulation are sufficiently "compelling" to justify the burdening of the organization's free exercise rights.[264]

With respect to the first prong, the *Yoder* Court stated that in order for the Amish mode of education to be protected by the free exercise clause, the religious faith of the Amish and their mode of life must be "inseparable and interdependent."[265] The Court maintained that activity motivated solely by philosophical or personal considerations is clearly outside the scope of free exercise protection.[266] In this case, however, the Court concluded that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of *deep religious conviction, shared by an organized group, and intimately related to daily living.*"[267]

Under *Yoder*'s second prong, the Court determined that insofar as the State compulsory-attendance law required the Amish to "perform acts undeniably at odds with fundamental tenets of their religious beliefs,"[268] its impact on Amish religious practices was severe and inescapable.[269] The *Yoder* Court's characterization of the law's impact as endangering the free exercise rights of the Amish takes on particular significance in light of the distinction drawn in prior cases between direct and indirect burdens on religious activity.[270]

For instance, in *Braunfeld v. Brown*,[271] the Court dealt with the claims of Orthodox Jewish merchants that Pennsylvania's Sunday closing laws violated their religious freedom by placing them at an economic disadvantage with their non-Sabbatarian competitors.[272] The Court held that the

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264. *Id.* at 219-34.

265. *Id.* at 215.

266. *Id.* at 216. The court in *Yoder* also took a realistic approach to the traditional "belief-action" distinction in the area of religious free exercise. 406 U.S. at 220. Prior cases had held that while religious *beliefs* were constitutionally protected from state interference, *actions* motivated by those beliefs were not immune from governmental regulation. *See* Gillette v. United States, 401 U.S. 437 (1971); Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1879). In *Yoder*, Chief Justice Burger stated:

> To agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

406 U.S. at 220.

267. *Id.* at 216 (emphasis added).

268. 406 U.S. at 218.

269. *Id.*

270. *See* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963); Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961). For a discussion of *Sherbert*, *see* notes 275-78 and accompanying text *infra*. For a discussion of *Braunfeld*, *see* notes 271-74 and accompanying text *infra*. Governmental regulation which actually probihits a given exercise of religious belief is considered to be a "direct burden," whereas a regulation which merely makes the exercise of religion more difficult or expensive is considered to be an "indirect burden." *See* Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3171 (E.D. Pa. 1977).

271. 366 U.S. 599 (1961).

272. *Id.* at 601-02.

Sunday closing laws were valid[273] since their effect on religious activity was only indirect.[274] Similarly, in *Sherbert v. Verner*,[275] the Court considered whether a state could constitutionally disqualify a Seventh-day Adventist from receiving unemployment compensation benefits because her religiously motivated refusal to work on Saturday caused her to fail the statutory requirement of being "available for work."[276] Although the *Sherbert* Court did not find the burden caused by the state action to be "direct,"[277] it nevertheless held that the state unconstitutionally violated the petitioner's free exercise rights.[278] Based on the direct-indirect burden analysis of *Braunfeld* and *Sherbert*, it is clear that the compulsory-attendance statute in *Yoder* constituted a direct burden[279] on religion, since it penalized the specific activity which the Amish believed to be religiously required.[280]

Yoder's third tier involved a balancing test, wherein the Court weighed the state interests in the regulation[281] against the interests of the Amish in exercising their religious practices.[282] The *Yoder* Court determined that the state interests were not sufficiently "compelling" to justify burdening the religious practices of the Amish.[283] In reaching this conclusion, the Court

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273. *Id.* at 609.

274. *Id.* at 605-09.

275. 374 U.S. 398 (1963).

276. *Id.* at 399-401.

277. In *Sherbert*, Justice Brennan stated: "In a sense the consequences of [the plaintiff's disqualification from unemployment benefits] to religious principles and practices may only be *an indirect result* of welfare legislation within the State's general competence to enact . . . ." 374 U.S. at 403 (emphasis added). While the state regulation in *Sherbert* did not place a direct burden on the plaintiff's Saturday worship, it did have the effect of making it significantly more costly, since the plaintiff was forced to forfeit benefits. *Id.* at 404. The *Braunfeld* Court had refused to find that making religious exercise more costly was in itself unconstitutional. *See* 366 U.S. at 605. However, the *Sherbert* Court distinguished *Braunfeld* on the basis that the state interest involved in *Braunfeld*—providing "one uniform day of rest for all workers"—was far more compelling than the state interest in *Sherbert*—maintaining the integrity of the unemployment fund by disqualifying some workers from unemployment benefits because of their religiously motivated refusal to work. 374 U.S. at 408-09.

278. 374 U.S. at 409-10. The general principal deducible from *Braunfeld* and *Sherbert* appears to be that while a governmental infringement of religious exercise may be invalidated by the Court whether it is direct or indirect, the Court will invalidate direct burdens more readily. In a case involving a direct burden on religious belief, the Court would require a "more particularized showing from the State" of an overriding interest. *See* Wisconsin v. Yoder, 406 U.S. at 227, 236.

279. The *Yoder* Court found that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

280. *Id.*

281. *Id.* at 219-30. The state's basic contentions were that 1) "some degree of education is necessary to prepare citizens to participate effectively and intelligently in an open political system if we are to preserve our freedom and independence"; and 2) "education prepares individuals to be self-reliant and self-sufficient participants in society." *Id.* at 221. Although the Court agreed that these state interests were important, it did not find them "compelling" in the *Yoder* case. *Id.*

282. *Id.* at 224-28.

283. *Id.* at 235-36. The third level of inquiry, assessing governmental interests and balancing them against the competing constitutional claims of the individual or group, has long

indicated that the history and tradition of a religious organization may be weighty factors in the balancing process.[284] The Court extensively considered the history of the Amish people,[285] noting that their religiously motivated practices have pervaded their culture for centuries.[286] Thus, *Yoder* suggests that prohibiting or burdening long-established religious traditions is a far more serious infringement of free exercise rights than prohibiting recently initiated religious activity,[287] particularly when the government has historically maintained a neutral policy with respect to the religious practice in question.[288]

One federal court applying *Yoder* to a free exercise case noted that the Court has apparently utilized a "sliding scale balancing test"[289] in weighing the competing interests of the religious organization and the government. The scale "slides" in that the greater the burden the regulation places on the exercise of religion, the stronger the provable governmental interest must be in order for the regulation to pass constitutional muster.[290] The Supreme

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been utilized by the Court in the area of first amendment fundamental freedoms. For first amendment symbolic speech cases involving a balancing approach, *see* Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 369 (1968).

In *Yoder*, Chief Justice Burger stated: "We must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." 406 U.S. at 221. In its conclusion, the Court suggested that "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." *Id.* at 235.

284. *See* 406 U.S. at 209-13, 225-27.

285. *Id.* at 209-12, 216-19, 222-27. Chief Justice Burger noted that "the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society." *Id.* at 225-26.

286. *Id.* at 225. The Court frequently referred to the centuries of religious practice and the highly developed community life of the Amish, which would be seriously threatened by forcing the Amish to comply with the compulsory school attendance laws. *Id.* at 215-19, 226-27. The Court declared that the state's interest in equipping its citizens with the level of education it determined to be necessary for good citizenship could not outweigh the strong historical showing of "[t]he independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country." *Id.* at 226-27. *See also id.* at 235.

287. *See* note 257 *supra*. Apparently attempting to caution newly formed religious groups against seeking exemption from governmental programs, Chief Justice Burger wrote: "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some progressive or more enlightened process for rearing children for modern life." 406 U.S. at 235.

288. The *Yoder* Court observed that Congress does not require groups such as the Amish to pay social security taxes because the Amish make their own provisions for their dependent members. *Id.* at 222 n.11. The Court also noted that several states had "adopted plans to accommodate Amish religious beliefs through the establishment of an 'Amish vocational school.' " *Id.* at 236 n.23. Moreover, the Court noted that, since the inception of the nation, the sect had been a "successful and self-sufficient segment of American society." *Id.* at 235.

289. *See* Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3170-71 (E.D. Pa. 1977).

290. *Id.* at 3171.

Court has also indicated that the free exercise scale is weighted in favor of the organization asserting infringement of its religious freedoms: "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion to permissible limitation.' "[291]

The Supreme Court has indicated that, in addition to the three prongs of the *Yoder* analysis, there is another factor relevant to free exercise cases which focuses on the "excessive entanglement" between the government and religious organizations.[292] Although the "excessive entanglement" test was developed in establishment clause cases,[293] it is submitted that it is equally applicable to free exercise cases because it goes to the heart of the "general principle deducible [from the religion clause decisions] . . . that [the Court] will not tolerate either governmentally established religion or governmental interference with religion."[294] Support for the conclusion that the entanglement factor is relevant in free exercise cases is found in *Catholic Bishop of Chicago*.[295] With respect to the free exercise issues raised by the NLRB's

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291. Sherbert v. Verner, 374 U.S. at 406 (1963), *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945).

292. *See* Walz v. Tax Comm'n, 397 U.S. 664, 697 (1970). In *Walz*, Chief Justice Burger enunciated the entanglement test as follows: "We must also be sure that the end result—the effect [of the legislation]—*is not an excessive government entanglement* with religion. The test is inescapably one of degree." *Id.* (emphasis added).

293. For examples of recent cases dealing with the question of whether state aid to primary and secondary religious schools violates the establishment clause because of "excessive entanglement," *see generally* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

294. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). One court stated that the essence of the entanglement factor is that "secular and religious authorities should not and cannot constitutionally interfere with the other's respective sphere of autonomy." McCormick v. Hirsch, 460 F. Supp. 1337, 1357 (M.D. Pa. 1978).

Prior to *Catholic Bishop of Chicago*, *see* notes 295-96 and accompanying text *infra*, there had been some uncertainty in the lower courts as to whether the Burger Court's "excessive entanglement" factor is applicable only in establishment clause cases, where it developed, or whether it is also applicable in free exercise cases. For instance, in order to reach the "excessive entanglement" analysis, the courts in both Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3178-79 (E.D. Pa. 1977), and McCormick v. Hirsch, 460 F. Supp. 1337, 1356-58 (M.D. Pa. 1978), found it necessary to invalidate the NLRB's assertion of jurisdiction over parochial schools on the basis of the establishment clause as well as the free exercise clause. It is submitted, however, that it is theoretically unsound to invalidate burdensome governmental regulations on the basis of the establishment clause, which was created to "insure that no religion be *sponsored* or *favored*." Walz v. Tax Comm'n, 397 U.S. at 669 (emphasis added). Moreover, the Supreme Court has never invalidated governmental activity on *both* religion clauses, preferring to view them as separate and distinct. *See* Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 15 (1978). Thus, in dealing with the constitutionality of the governmental regulation of religious schools, it is submitted that "excessive entanglement" should be treated as one factor under the free exercise analysis, not as creating a separate establishment violation. Support for this position is provided in dictum in *Catholic Bishop of Chicago*. *See* notes 295-96 and accompanying text *infra*.

295. For a discussion of *Catholic Bishop of Chicago*, *see* notes 205-12 and accompanying text *supra*.

assertion of jurisdiction over parochial schools, the *Catholic Bishop of Chicago* Court declared:

> Good intentions by government—or third parties—can surely no more avoid *entanglement* with the religious mission of the schools in the setting of mandatory collective bargaining than in the well motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek,* and *Wolman* [all dealing with the establishment clause].[296]

Finally, it is submitted that a court reaching the constitutional grounds of a Christian school unemployment compensation case would find persuasive the free exercise discussions of three lower courts in the factually similar parochial school-NLRB cases[297] which culminated with the Supreme Court's decision in *Catholic Bishop of Chicago.*[298] In each of the three cases, *Catholic Bishop of Chicago v. NLRB,*[299] *Caulfield v. Hirsch,*[300] and *McCormick v. Hirsch,*[301] the courts found that the administration of the NLRA by the NLRB in the context of church schools[302] was unconstitutional in that the Act's provisions both impinged upon the free exercise rights of the schools[303] and created an "excessive entanglement" of church and

296. 99 S. Ct. at 1319. *See* Wolman v. Walter, 433 U.S. 229, 244 (1977); Meek v. Pittenger, 421 U.S. 349, 370 (1975); Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

297. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds,* 99 S. Ct. 1313 (1979); McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978); Caulfield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. 1977). For a discussion of the facts of these three cases and their similarities to the Christian school unemployment compensation cases, *see* notes 299-302 and accompanying text *infra.*

298. 99 S. Ct. 1313 (1979). In *Catholic Bishop of Chicago,* Chief Justice Burger did not state that the court of appeals erred in disposing of the case on constitutional grounds. Indeed, the Chief Justice referred extensively to the free exercise portions of the lower court's opinion. *See id.* at 1316-17, 1320.

299. 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds,* 99 S. Ct. 1313 (1979). For the facts of the *Catholic Bishop of Chicago* case, *see* notes 205-10 and accompanying text *supra.*

300. 95 L.R.R.M. 3164 (E.D. Pa. 1977). In *Caulfield,* a Catholic lay teachers' union filed a petition with the NLRB seeking to be certified as the teachers' exclusive bargaining representative for purposes of carrying on collective bargaining with the "employer." *Id.* at 3165. The NLRB issued an opinion stating that the Archdiocese was the employer of the lay teachers and that all full-time lay teachers in the elementary schools constituted an appropriate bargaining unit. *Id.* at 3165-66. It was implicit in the NLRB's decision that the NLRB would order an election to allow the teachers to determine their representative. *Id.* The Archdiocese brought suit in district court seeking both preliminary and permanent injunctions to prevent the NLRB from causing an election to be held. *Id.*

301. 460 F. Supp. 1337 (M.D. Pa. 1978). The *McCormick* case involved facts nearly identical to *Caulfield,* and was also brought in the federal district court seeking injunctive relief prior to a final administrative order. *See* 460 F. Supp. at 1340. *See also* Comment, *supra* note 261.

302. The Christian school unemployment compensation cases, like the parochial school-NLRB cases, deal with the administrative interpretation of a federal act (FUTA), by a federal agency (the Department of Labor), in the context of church-related schools. *See* notes 120-28 and accompanying text *supra.* Even the nature of the burdens imposed by the two acts on the decisionmaking process of church school administrators is similar. *See* note 343 and accompanying text *infra.* It is submitted that the similarities between the Christian school unemployment cases and the parochial school labor cases tend to make the constitutional analysis of the latter applicable and influential in deciding the former.

303. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1124-31; McCormick v. Hirsch, 460 F. Supp. at 1352-58; Caulfield v. Hirsch, 95 L.R.R.M. at 3175-80.

state.[304] Utilizing an approach similar to that of the Court in *Yoder*,[305] the lower courts found that 1) the parochial schools were a legitimate exercise of a genuine religious belief;[306] 2) the application of the NLRA to the schools inhibited the exercise of religious endeavors;[307] and 3) the interests of the schools in remaining outside the scope of the NLRA outweighed the interest of the government in bringing them within it.[308]

2. *An Application of The Free Exercise Analysis To Unemployment Compensation Coverage of Christian Schools*

a. *Christian School Education as an Exercise of a Genuine Religious Belief*

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304. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1121, 1128 ("we have difficulty in finding avoidance of entanglement"); McCormick v. Hirsch, 460 F. Supp. at 1357 ("the kind of entanglement involved in the instant case is administrative entanglement"); Caulfield v. Hirsch, 95 L.R.R.M. at 3178-79 ("the entangling relationships which can arise under the NLRA appear in a wide variety of ways").

305. Regarding the *Yoder* approach to adjudication of free exercise claims, *see* notes 259-64 and accompanying text *supra*.

306. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1121-22; McCormick v. Hirsch, 460 F. Supp. at 1352-53; Caulfield v. Hirsch, 95 L.R.R.M. at 3171-72, 3176.

307. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1123-26; McCormick v. Hirsch, 460 F. Supp. at 1353-56; Caulfield v. Hirsch, 95 L.R.R.M. at 3176-78.

308. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1130-31; McCormick v. Hirsch, 460 F. Supp. at 1356; Caulfield v. Hirsch, 95 L.R.R.M. at 3178. It is submitted that several important principles applicable to the Christian school unemployment compensation cases may be deduced from the Catholic school labor cases. First, the cases indicate a willingness on the part of the courts to grant the religious schools substantially the status of a "church" with respect to protecting their religious freedoms. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1119-22; McCormick v. Hirsch, 460 F. Supp. at 1352-53; Caulfield v. Hirsch, 95 L.R.R.M. at 3171-72. Second, according to these cases, the government may be prohibited from regulating religious schools even if the regulatory program is of a general and nondiscriminatory nature. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 114; Caulfield v. Hirsch, 95 L.R.R.M. at 3176. *See also* Wisconsin v. Yoder, 406 U.S. at 220. Third, courts are willing to look beyond the facial provisions of a regulatory program to determine the extent to which the regulation, *as applied* to a religious school, will infringe or burden the school's religious activities. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1123-25; Caulfield v. Hirsch, 95 L.R.R.M. at 3176-79. Fourth, it is evident from the Catholic school labor cases that even federal programs which are firmly rooted in important national policies and which have a history of continuously expanding coverage will be prohibited from entering the domain of religious schools if substantial infringement of the schools' religious freedoms would be the likely result. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1130; McCormick v. Hirsch, 460 F. Supp. at 1357; Caulfield v. Hirsch, 95 L.R.R.M. at 3172, 3176. The infringement must be "substantial" because "[g]overnment regulation which effects [*sic*] religious activity is inevitable in this day and age; a total separation of church and state is not possible." Caulfield v. Hirsch, 95 L.R.R.M. at 3178. Fifth, the cases indicate that the religious rights of the schools will be upheld even though employees of the school, or others closely associated with it, will be affected adversely. McCormick v. Hirsch, 460 F. Supp. at 1350, 1358; Caulfield v. Hirsch, 95 L.R.R.M. 3176, 3178. Finally, the cases demonstrate a remarkable propensity of the courts to break with established procedure and utilize extraordinary remedies to enjoin the government from putting into effect a regulatory program. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1116-19, 1130-31; McCormick v. Hirsch, 460 F. Supp. at 1348; Caulfield v. Hirsch, 95 L.R.R.M. at 3166-69, 3180. For a discussion of how the *Grace Brethren* court overcame serious procedural obstacles to entertain jurisdiction of that Christian school unemployment compensation case, *see* notes 143-46 and accompanying text *supra*.

In applying the free exercise analysis set out above, it would appear that Christian schools pass the first prong of *Yoder*[309] in that they tend to be run by churches[310] or religiously motivated parents[311] as an exercise and outgrowth of legitimate and sincerely held religious beliefs.[312] Although the remarkable growth in Christian school education has been fairly recent,[313] Christian schools in the United States have a heritage that dates back to the colonial era.[314] Because parents and teachers who become involved in Christian education are often motivated by perceived Scriptural mandates to teach children in accordance with the Bible,[315] the schools attempt to integrate Scriptural principles into all aspects of education.[316]

b. *The Burdening Effect of the Unemployment Compensation Laws on the Religious Mission of Christian Schools*

Proceeding to the second prong of *Yoder*,[317] there are substantial indications that the administration of the unemployment compensation laws will have a material impact on the exercise of the religious beliefs of the administrators, teachers, parents, and children associated with Christian schools. The most obvious effect that the unemployment compensation laws have had on Christian schools is the imposition of a tax burden.[318] For example, the

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309. For the first prong of the *Yoder* Court's three-tiered free exercise analysis, *see* note 262 *supra*.

310. For a discussion of church-operated Christian schools, *see* notes 25-32 and accompanying text *supra*.

311. For a discussion of parent-operated Christian schools, *see* note 26 and accompanying text *supra*.

312. Regarding the religious underpinnings of Christian schools, *see* notes 17-21 and accompanying text *supra*. The Supreme Court has, on several occasions, found parochial schools to be pervasively religious. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366 (1975); Sloan v. Lemon, 413 U.S. 825, 830 (1973); Lemon v. Kurtzman, 403 U.S. 602, 613-18, 657 (1971). *See also* McCormick v. Hirsch, 460 F. Supp. at 1352-53; Caulfield v. Hirsch, 95 L.R.R.M. at 3171-72. Many of the aspects of the parochial schools which led the Court to conclude that they are "pervasively religious" are also found in Christian schools. For example, with respect to the parents and administrators of one Christian school, the Supreme Court of Ohio stated: "[T]hese appellants are God-fearing people with an abiding religious conviction that Biblical training is essential to the proper inculcation of spiritual and moral values into their youth." State v. Whisner, 47 Ohio St. 2d 181, 200, 351 N.E.2d 750, 762 (1962).

313. *See* notes 17-21 and accompanying text *supra*.

314. P. KIENEL, *supra* note 20, at 96. *See* note 20 *supra*.

315. *See Dueteronomy* 6:5-9; *Proverbs* 1:7, 22:6; notes 27-29 and accompanying text *supra*.

316. *See* R. LOWRIE, TO THOSE WHO TEACH IN CHRISTIAN SCHOOLS 11-17 (1978); notes 27-29 and accompanying text *supra*.

317. For the second prong of the *Yoder* Court's three-tiered free exercise analysis, *see* note 263 and accompanying text *supra*.

318. For a discussion of the types and amount of unemployment compensation taxes, *see* notes 72-87 and accompanying text *supra*. One of the original justifications for requiring profitmaking organizations to pay unemployment taxes while exempting nonprofit organizations was that profitmaking organizations could pass along the cost to the consumer in the form of higher prices as a legitimate "business expense," whereas nonprofit organizations, dependent largely on charitable contributions, could only cover the cost by increased donations. Witte, *The Essentials of Unemployment Compensation*, 25 NAT'L MUN. REV. 157, 160, 161 (1936). Moreover, Con-

Quaker school in *Germantown Friends School v. Joseph*,[319] was assessed contributions in the amount of $16,800 for a single year.[320] While under the elective reimbursement method of payment[321] a school will not incur a tax liability in a year of full employment,[322] the school is exposed to a risk of considerably higher reimbursement liability in the event of numerous layoffs.[323] While some schools are probably capable of surviving the new tax, it is conceivable that other schools, already hovering on the brink of insolvency, may actually be forced into bankruptcy as a result of FUTA.[324] This is particularly true of a school which elects to make reimbursements and then, due to an unexpected need to lay off numerous employees, becomes liable for contributions beyond its capacity to pay.[325]

This potential liability could, it is suggested, instill in administrators of Christian schools which have chosen the reimbursement mode of payment[326] a reluctance to hire additional faculty.[327] For those schools not electing the reimbursement mode, payment of the standard unemployment tax will cause a reduction in the amount of funds available for new salaries. Limiting the employment of new teachers tends to necessitate a reduction in the enrollment of new students,[328] which in turn tends to diminish the income needed to fund building programs and curricula improvements.[329]

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gress has recognized the unique dependency of nonprofit organizations on gifts (as opposed to sales) which constitute the primary source of their income. S. REP. NO. 752, 91st Cong., 2d Sess. 14, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3606, 3618.

319. No. 79-1539 (E.D. Pa. Sept. 6, 1979).

320. Brief for Plaintiff at 3, Germantown Friends School v. Joseph, No. 79-1539 (E.D. Pa. Sept. 6, 1979).

321. For a discussion of the reimbursement method of unemployment compensation payments, *see* notes 78-87 and accompanying text *supra*.

322. *See* notes 79-81 and accompanying text *supra*.

323. *See* note 87 and accompanying text *supra*.

324. Attorney William Ball, representing the Association of Christian Schools International at a public hearing on Proposed Revenue Procedure 4830-01 (relating to the tax-exempt status of private schools), stated with respect to the financial strength of Christian schools:

> I know of no religious school today which has a nickle to spare. Their resources are only as deep as their parishioners' pockets. The schools I represent are all relatively small schools. They are not publicly funded; the parents who enroll their children there typically do so at great personal sacrifice. They already pay public school taxes.

Public Hearing on Proposed Revenue Proc. 4830-01 on Private Schools, Wash., D.C., Dec. 5, 1978, at 10 (testimony of William B. Ball, Esq.).

325. Concerning the threat of enormous contribution liability during a period of massive layoffs, *see* note 87 and accompanying text *supra*.

326. *See* notes 78-87 and accompanying text *supra*.

327. *See* note 87 and accompanying text *supra*.

328. Numerous studies in the field of education have concluded that the teacher-student ratio in elementary and secondary classes should not exceed one teacher per 15 to 30 students, depending upon the nature of the subject matter and the age of the children. *See generally* Bozzomo, *Does Class Size Matter?*, 57 NAT'L ELEM. PRINCIPAL 78-81 (Jan. 1978); Nelson, *What's Happening with Class Size?*, 124 PA. SCHOOL J. 118-20 (Mar. 1976).

329. Regarding the expense of expanding and upgrading Christian schools, *see generally* CHRISTIANITY TODAY, May 5, 1978, at 21-22; THE NAT'L OBSERVER, Jan. 15, 1977, at 18; U.S. NEWS & WORLD REPORT, Oct. 8, 1973, at 45-46. Many Christian schools in the past decade have experienced exceptional growth. *See* notes 20-24 and accompanying text *supra*. The

Furthermore, unemployment compensation taxes burden the parents and church members who sponsor the schools and who ultimately provide the additional tuition and gifts necessary to pay the taxes.[330] Since educational costs tend to be rising more rapidly than personal income,[331] and since Christian school parents must also pay *public* school taxes,[332] there is no assurance that the increased burden can be met by increased giving. This constriction of the growth of Christian schools, it is submitted, constitutes a particularly serious burden to the schools under the second prong of *Yoder* because the administrators of many Christian schools believe that they are commanded by Scripture to increase in size and number in order to serve all parents desirous of giving their children a Christian education.[333]

In addition to paying unemployment taxes, Christian schools are required by the unemployment compensation statutes to keep extensive records regarding their organization and its employees.[334] Since FUTA only requires coverage of employees who spend more than one half of their time engaged in nonexempt services,[335] the schools will be required to deter-

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growth of recently established Christian schools is often achieved by adding new grades over a period of time. The addition of a new grade frequently involves a risk on the part of the administration since a new teacher must often be hired before enough enrollment interest has been displayed in a new grade to economically justify its addition. By requiring reimbursement payment of a school which lays off a teacher in a situation where the addition of a new grade proved to be premature, it could be argued that the state is penalizing an error in the administrator's judgment, and chilling his inclination to expand the size of the school.

330. *See* U.S. NEWS & WORLD REPORT, Oct. 8, 1973, at 46.

331. Regarding the soaring cost of education, one source has noted:

> In the last seven years the cost of educating a public school student has doubled. According to a nationwide survey of school-district budgets conducted by Market Research Retrieval, an education-research company based in Westport, Connecticut, the average cost of educating a student in the nation's public schools rose from $553.95 during the 1967-68 school year to $1,108.22 during 1974-75.

P. KIENEL, *supra* note 16, at 99. During a comparable time period, average weekly earnings in private nonagricultural establishments, manufacturing, and trade rose from $95.00 in 1965 to $138.00 in 1972. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, vol. 19, No. 4, at 27 (Oct. 1972).

332. The seeming inequity of requiring parents—who pay tuition to send their children to private schools—to also pay public school taxes has led some states to pass tuition tax deductions. *See, e.g.*, N.J. STAT. ANN. § 54A:3-1 (West Supp. 1977) (declared unconstitutional); Act of May 22, 1972, ch. 414, §§ 3-5, 1972 N.Y. Laws 887-88 (to amend N.Y. TAX LAW § 612(c), (j)) (McKinney Supp. 1972-73) (declared unconsitutional). For the most part, these state income tax deductions have failed to survive constitutional challenges in the courts. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514 (1979).

333. P. KIENEL, *supra* note 20, at 9-10, 19, 71-72; P. KIENEL, *supra* note 29, at 1-3.

334. Regarding the recordkeeping requirements imposed by the unemployment compensation laws, *see* notes 88-100 and accompanying text *supra*. The *Grace Brethren* court, in assessing the burdening effect of the laws on Christian schools, noted that records for each employee must be maintained regarding the hours worked, the wages paid, and, in cases where the employee serves both the church and the school, the exact proportion spent working for each. *See* Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 10-11 (C.D. Cal. Sept. 21, 1979).

335. I.R.C. § 3306(d).

mine, and the state will be required to investigate, what percentage of an employee's time is spent serving the church directly, and what percentage is spent serving the school.[336] The laws also throw open to governmental scrutiny many other records in the Christian schools which were previously immune from such investigation.[337] Since the records must be detailed, accurate, retained over a long period, and open to inspection at any time,[338] larger Christian schools may be required to employ trained personnel to compile the data, and to obtain additional facilities to store it.[339] In sum, the recordkeeping provisions will tend to infringe upon the privacy of the schools, will require the expenditure of money, and will use up a good deal of time and space, thus imposing substantial burdens upon the religious mission of Christian schools.

A third serious impact of the unemployment compensation laws on Christian schools is the tendency of the laws to draw schools into litigation over the issue of whether employment was terminated for "good cause."[340] For a Christian school electing the reimbursement method of payment,[341] "good cause determinations" could seriously affect the school's financial status because if the school prevails, it pays nothing; but if it loses, full reimbursement is required.[342] In this regard, "good cause" determinations could chill a Christian school administrator's Scripturally based decision to fire a teacher for engaging in or advocating such secularly acceptable conduct as smoking, the consumption of alcoholic beverages, the use of profanity, or extramarital sex.[343] In essence, "good cause" litigation would require the

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336. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 11-12 (C.D. Cal. Sept. 21, 1979).

337. Christian schools have asserted that the unemployment compensation laws have required the schools to keep records and divulge information to an extent never previously mandated. *See id.* at 13. Brief for Petitioner at 36, Germantown Friends School v. Pennsylvania Dep't of Labor and Indus., No. 940 (Pa. Commw. Ct., filed Oct. 12, 1979); N.Y. Christian Schools Memorandum, *supra* note 196, at 21-22.

338. *See* notes 88-100 and accompanying text *supra*.

339. *See* note 337 and accompanying text *supra*.

340. For a discussion of "good cause" litigation, *see* notes 100-07 & 215 and accompanying text *supra*.

341. Regarding the election of reimbursement unemployment compensation payments, *see* notes 78-82 and accompanying text *supra*.

342. *See* notes 79 & 87 and accompanying text *supra*.

343. The district court in *Grace Brethren* stated that

> disputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church.
>
> The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the court found to involve dangers of excessive entanglement in *Catholic Bishop*. . . . Such an inquiry, taken by itself, involves impermissible entanglement of the state with the church, violative of the separation of those entities mandated by the Constitution.

Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 12 (C.D. Cal. Sept. 21, 1979). For a discussion of the necessary qualifications for teachers in Christian schools, *see* notes 197-98 and accompanying text *supra*. In *Catholic Bishop of Chicago*, the

government to decide whether a Christian school's action, taken on the basis of Biblical standards, is "just" under the prevailing standards of the state labor bureau.

The foregoing burdens imposed by FUTA on Christian schools may initially appear to be indirect in nature,[344] since the Labor Department has not stated that the Christian schools cannot continue to operate and carry on their religious mission but has, instead, made such exercise more costly. It could be argued that this factor of indirectness may place the Christian school unemployment cases outside the scope of the *Yoder* analysis, in that the proposed governmental action in *Yoder* would have had an immediate and direct impact on the actual participation of children in the traditional Amish educational process.[345] It is submitted, however, that if the taxation imposed by FUTA tends to force some Christian schools to close, or significantly inhibits their growth, the burden on the schools could reasonably be considered direct. In *Braunfeld,* for instance, the burden that the Court characterized as indirect was the tendency of the Sunday trading laws to place Jewish merchants at a severe economic disadvantage, possibly forcing them out of business.[346] However, the business carried on by the plaintiffs in *Braunfeld* was not primarily religious,[347] as is the case with Christian schools.[348] In this respect, it is suggested that taxing Christian schools into insolvency would constitute a direct burden on religious activity by causing that activity to cease, thus bringing the controversy within the scope of the *Yoder* analysis.

c. *Balancing the Interests of the Government and the Schools*

The third level of inquiry under the *Yoder* analysis—*i.e.*, whether the state's interest is sufficiently compelling to overcome the infringement of religion—presents the greatest problems of valuation and prediction.[349] The governmental interest in protecting employees from the ravages of unemployment is undeniably strong. Most observers agree that FUTA has generally been successful in ameliorating the effects of unemployment on indi-

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Seventh Circuit noted that three unfair labor practice charges had been filed with the Board regarding the firing of lay teachers in the parochial schools for violating the tenets of the Catholic church. 559 F.2d at 1125. The grounds for the terminations were 1) teaching the sexual theories of Masters and Johnson; 2) marrying a divorced Catholic; and 3) refusing to structure a religion course as directed by the principal and the chairman of the religion department. *Id.*

344. For a discussion of the constitutional distinction between direct and indirect burdens on religious exercise, *see* notes 270-80 and accompanying text *supra.*

345. *See* notes 279-80 and accompanying text *supra.*

346. 366 U.S. 599, 601 (1961). For a discussion of *Braunfeld, see* notes 271-74 and accompanying text *supra.*

347. The *Braunfeld* Court stated: "[T]he statute at bar does not make unlawful any *religious* practices of appellants; the Sunday law simply regulates a *secular* activity . . . ." 366 U.S. at 605 (emphasis added).

348. *See* notes 27-29 & 310-16 and accompanying text *supra.*

349. *See* notes 281-91 and accompanying text *supra.*

viduals in America,[350] and the pressures are great to extend its coverage to as many workers as possible.[351] However, it is submitted that in the context of extending unemployment compensation coverage to Christian school employees, neither the government's interests in protecting the unemployed individual[352] nor its interests in protecting national economic stability[353] are "compelling."

With respect to the governmental interest in protecting the welfare of unemployed workers individually, there were no indications at the congressional hearings on the 1976 FUTA amendments that any significant unemployment problems exist in Christian schools.[354] In fact, given the recent rise in the number and size of Christian schools,[355] it would seem that teaching positions in these schools would be increasing, not decreasing. While the government may contend that unemployment in the Christian schools may become a serious problem in the future, it is submitted that a contingent or anticipated interest should not be considered "compelling" for purposes of this first amendment balancing approach.

Turning to the governmental interest of protecting the national economy, it is submitted that exempting Christian schools from FUTA poses no threat to the national economy because employment in Christian schools is stable and because Christian school employees constitute only a minute percentage of the total work force.[356] With respect to the government interests in maximizing the solvency and effectiveness of the unemployment funds, the fact that Congress exempted nonprofit organizations from the *federal* tax[357] and permitted them to pay *reimbursements* to the state funds,[358] indicates that the congressional motivation for extending FUTA coverage to nonprofit organizations was primarily a desire to assist the unemployed of

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350. *See* note 56 and accompanying text *supra*.

351. *See* notes 50-56 and accompanying text *supra*.

352. *See* notes 53-54 and accompanying text *supra*.

353. *See* note 55 and accompanying text *supra*.

354. *See* sources cited note 111 *supra*. Ironically, some of the very same Christian school employees that the FUTA amendments were designed to protect are opposed to it. The complaint in Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP (C.D. Cal., Sept. 21, 1979) includes several teachers as plaintiffs. *Id.*, Complaint at 5-6. Furthermore, Christian school teachers may believe that, due to the private source of funding of their schools, a financially healthy and growing school is a better guarantee of employment security than government-sponsored unemployment compensation. Similarly, the teachers may have a dedication to the schools that transcends their own economic needs. *See* P. KIENEL, *supra* note 20, at 109-15.

355. *See* notes 20-24 and accompanying text *supra*.

356. The Labor Department's figure for the total number of employees in all nonprofit (including private, parochial, and Christian) schools is 242,000. Conformity Proceeding—Decision of the Secretary, *supra* note 50, at 10. *See also* S. REP. NO. 1265, 94th Cong., 2d Sess. at 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6004.

357. *See* note 166 and accompanying text *supra*.

358. *See* notes 78-80 and accompanying text *supra*.

those organizations,[359] and that the issue of the solvency and funding of the state programs was not a factor.[360]

It is therefore submitted that, in light of the serious infringement of religious practice caused by extending FUTA coverage to Christian schools,[361] and due to the lack of clearly compelling governmental interests in so extending FUTA,[362] the balance in the unemployment cases should be struck in favor of the Christian schools.[363]

d. *Excessive Entanglement*

It is submitted that the application of FUTA to Christian schools constitutes "excessive governmental entanglement" in the affairs of religious organizations.[364] As was true with respect to the NLRB in *Catholic Bishop of Chicago*, the state unemployment boards are required to oversee and intervene in the day-to-day operations of the schools.[365] The state agencies have broad subpoena and investigatory powers over the affairs and records of the Christian schools.[366] Where church schools have employees who also serve the church, the state will be required to make and enforce guidelines to aid school administrators in the difficult determination as to what percentage of employment is "secular" and covered by the law, versus what portion is excluded as being sufficiently "religious."[367] Moreover, in many instances

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359. *See* notes 110-13 and accompanying text *supra*.

360. It is clear that Congress anticipated that the cost of the coverage of nonprofit schools would be largely paid for out of general federal revenues and that the schools would not "pay their own way." S. REP. NO. 1265, 94th Cong., 2d Sess. at 11, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6004.

361. *See* notes 318-43 and accompanying text *supra*.

362. *See* notes 349-60 and accompanying text *supra*.

363. This conclusion is buttressed by the *Yoder* Court's suggestion that the interests of the government in a given regulation must reach extraordinary proportions before the government may validly destroy a religious privilege rooted in centuries of tradition. 406 U.S. at 235-36. *See* notes 283-88 and accompanying text *supra*. An examination of the history of Christian schools reveals that they are firmly grounded in a tradition of Christian education that predates the American Revolution. P. KIENEL, *supra* note 20, at 96. Until the 1976 amendments to FUTA, Christian schools had been entirely exempt from the payment of unemployment taxes. *See* note 108 and accompanying text *supra*. Moreover, throughout American history, Christian schools have been granted tax-exempt status by both federal and state governments. *See* Walz v. Tax Comm'n, 397 U.S. 664, 676-78 (1970). Therefore, in considering the history and tradition of Christian schools and the long-established national policy of not taxing religious organizations, it is submitted that the Supreme Court would follow its precedent in *Yoder* and strike a free exercise balance in favor of the schools. Indeed, the one lower court case which has addressed the free exercise issue held that the imposition of Tennessee's unemployment compensation statute on Christian schools violated the schools' first amendment, free exercise rights. Independent Baptist Church v. Tennessee, No. 54227, slip op. at 6-9 (Ch. Ct. of Hamilton County, Tenn. Mar. 23, 1979) (unpublished opinion).

364. For an explanation of the excessive entanglement factor, *see* notes 292-96 and accompanying text *supra*.

365. *See* notes 334-39 & 343 and accompanying text *supra*.

366. *See* notes 96-100 and accompanying text *supra*.

367. *See* notes 335-36 and accompanying text *supra*.

when a Christian school employee is laid off and seeks benefits, the state will be required to scrutinize the decision of the school to determine whether the decision to fire or leave was justified under the "good cause" standard.[368] It is thus suggested that the *Grace Brethren* court correctly found that governmental oversight of the reasons for Christian school employee terminations has become "far more intrusive than that [involved in] *Catholic Bishop*. . . . [C]learly . . . unconstitutional entanglement . . . is occurring on a regular basis."[369]

In light of the foregoing analysis, it is submitted that the application of the unemployment compensation laws to Christian schools violates their first amendment free exercise rights, both on the basis of the *Yoder* "substantial burdening" analysis and on the basis of the Court's "excessive entanglement" factor.

V. CONCLUSION

The powerful economic interests involved in the expansion of unemployment compensation coverage[370] have collided head-on with the weighty religious free exercise claims of the rapidly expanding Christian schools.[371] In resolving this conflict, it is not the position of this comment that Christian schools should ignore the needs of their past, present, or future employees. Rather, it is suggested that subjecting Christian schools to the unemployment compensation laws is 1) unpragmatic, in light of the expanding levels of employment in the schools;[372] 2) not statutorily mandated, in view of the section 3301(b)(1) exception to FUTA[373] and in the absence of a clear congressional intent to subject Christian schools to these laws;[374] and 3) unconstitutional, based on the *Yoder* analysis of the free exercise clause.[375] Finally, it is submitted that although the ideals behind the unemployment compensation laws are undeniably laudable,[376] governmental enforcement of such laws, in the context of Christian schools, should only be

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368. For a discussion of the "good cause" eligibility requirement for unemployment compensation benefits, *see* notes 101-07, 215 & 343 and accompanying text *supra*.

369. Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 13 (C.D. Cal. Sept. 21, 1979).

370. Regarding the socio-economic policies behind expanding the unemployment compensation laws, *see* notes 53-56 and accompanying text *supra*.

371. *See* notes 20-24 and accompanying text *supra*.

372. *See* notes 354-55 and accompanying text *supra*.

373. For a discussion of the § 3309(b)(1) exception to FUTA, *see* notes 175-201 and accompanying text *supra*.

374. For a discussion of the lack of explicit congressional intent to include Christian schools in the federal-state unemployment compensation program, *see* notes 202-52 and accompanying text *supra*.

375. For a discussion of the *Yoder* Court's three-tiered analysis of free exercise rights, *see* notes 259-70 & 281-91 and accompanying text *supra*. For a discussion of the constitutionality of the unemployment compensation laws as applied to Christian schools, *see* notes 310-69 and accompanying text *supra*.

376. *See* notes 53-56 and accompanying text *supra*.

resorted to in extraordinary situations.[377] Churches have their own mechanisms for caring for their unemployed and providing them with new jobs.[378] Religious organizations have often been in the vanguard of those who seek affirmative social change in America.[379] It is submitted that, in view of the fact that no weighty governmental interests will be jeopardized,[380] Christian schools should continue to be excluded from coverage under the unemployment compensation laws.

R. Leonard Davis III

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377. One such extraordinary situation might arise if massive unemployment existed among Christian school teachers and the schools themselves were incapable of ameliorating the situation. Presently, however, there is no indication that unemployment levels are high among Christian school teachers. *See* notes 354-55 and accompanying text *supra*.

378. *See generally* B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE 104-26, 129 (1965).

379. *See generally* S. EISENSTADT, THE PROTESTANT ETHIC AND MODERNIZATION (1968); G. LENSKI, THE RELIGIOUS FACTOR: A SOCIOLOGICAL STUDY OF RELIGIOUS IMPACT ON POLITICS, ECONOMICS, AND FAMILY LIFE 309-21 (1961); H. MARTIN, CHRISTIAN SOCIAL REFORMERS OF THE NINETEENTH CENTURY (1927); K. SILVERT, CHURCHES AND STATES: THE RELIGIOUS INSTITUTION AND MODERNIZATION (1967).

380. For a discussion of the weighing process utilized by the Court to adjudicate constitutional claims when religious and governmental values conflict, *see* notes 281-91 and accompanying text *supra*.